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In The

# Supreme Court of the United States

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE, and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

JOHN M. BULGER, Interim District Director, Florida, Bureau of Citizenship and Immigration Services; THOMAS RIDGE, Secretary, Department of Homeland Security; JOHN ASHCROFT, Attorney General of the United States; DEPARTMENT OF HOMELAND SECURITY; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In *Jean v. Nelson*, 472 U.S. 846 (1985), this Court held that the facially-neutral immigration parole statute and regulations at issue in this case require immigration officials to make "individualized parole determinations" and that such determinations be made "without regard to race or national origin." In the instant case, however, the district court and the court of appeals limited this Court's holding in *Jean v. Nelson* to its facts. In distinguishing *Jean*, the lower courts held that immigration officials have the authority, despite the neutral parole statute and regulations, to use national origin and/or race as a broad factor in discriminating against Haitian asylum-seekers regarding their release from detention pending the adjudication of their asylum claims. The questions presented are:

(1) Whether, consistent with this Court's interpretation in *Jean v. Nelson*, immigration officials may act contrary to facially-neutral statutes and regulations in the making of immigration parole decisions by discriminating against Haitian asylum-seekers based on their nationality and/or race.

(2) Whether the lower courts, under either habeas or federal question jurisdiction, erred in failing to follow the Federal Rules of Civil Procedure when they ruled against petitioners on the merits without granting discovery, hearing, or trial; without construing the facts in the light most favorable to petitioners; without determining whether there were genuine issues of material fact; and while considering only limited briefing on emergency motions for preliminary relief.

## PARTIES TO THE PROCEEDING

Petitioners (appellants below) are Ernest Moise, Hedwiche Jeanty, Brunot Colas, Junior Prospere, Peterson Belizaire, and Laurence St. Pierre, on behalf of themselves and all others similarly situated.

Respondents (appellees below) are John M. Bulger, Interim District Director, Florida, Bureau of Citizenship and Immigration Services; Thomas Ridge, Secretary, Department of Homeland Security; John Ashcroft, Attorney General of the United States; Department of Homeland Security; Bureau of Immigration and Customs Enforcement; and United States Department of Justice.[1]

[1] Effective March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an agency of the Department of Justice, and its immigration enforcement functions were transferred to the Bureau of Immigration and Customs Enforcement ("BICE") within the Department of Homeland Security ("DHS"). Under Supreme Court Rule 34.1(c), this petition amends the caption and parties as they appeared before the lower courts to reflect this change.

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## PETITION FOR A WRIT OF CERTIORARI

Ernest Moise, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1-3) is reported at 321 F.3d 1336.[2] The original order of the court of appeals denying both the petition for rehearing and the petition for rehearing *en banc* (App. 41-42) is unreported. The opinion of the district court (App. 4-40) is reported at 204 F. Supp. 2d 1366.

## BASIS FOR SUPREME COURT JURISDICTION

The court of appeals entered its judgment on February 20, 2003. Petitions for rehearing and for rehearing *en banc* were denied on May 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[2] Record documents reproduced in the Appendix to this petition are referenced by "App." followed by the page number. Other documents contained in the record of the Eleventh Circuit Court of Appeals are referenced by "R" followed by the volume, document, and page numbers.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are pertinent provisions of Section 1182(d)(5)(A) of Title 8 of the United States Code (the parole statute), Section 212.5 of Title 8 of the Code of Federal Regulations (the parole regulation), and Section 1252(a)(2)(B)(ii) of Title 8 of the United States Code (judicial review provision). App. 47-51.

## STATEMENT OF THE CASE

### A. Introduction.

In *Jean v. Nelson*, 472 U.S. 846 (1985), a group of Haitian asylum-seekers challenged a discriminatory detention policy substantially similar to the policy at issue in this case. Like petitioners here, the petitioners in *Jean* were detained under a policy that mandated the prolonged incarceration of virtually all Haitian asylum-seekers pending an adjudication of their asylum claims, while asylum-seekers of other nationalities were routinely released on parole during the same period. This Court considered the discriminatory detention policy, which by then had been abandoned by immigration officials, and held that such a policy was prohibited by the facially-neutral parole statute and regulations, which required that immigration officials (1) make "individualized determinations of parole" and (2) do so "without regard to race or national origin." *Jean*, 472 U.S. at 857. Thus, the Court and the government assured petitioners that they were protected from future discrimination by the immigration statute and regulations it interpreted.

Despite this assurance, however, immigration officials have again instituted a discriminatory parole policy that differentiates on the basis of Haitian nationality, resulting in prolonged detention for Haitian asylum-seekers in south Florida and release for asylum-seekers of other nationalities. Although this Court held in *Jean* that the facially-neutral statute and regulations require nondiscriminatory parole determinations, the courts below concluded that immigration officials can consider Haitian nationality—and thus discriminate against Haitian asylum-seekers—when making parole determinations. The lower courts' endorsement of this discriminatory treatment, which follows a long history of discrimination against Haitian nationals in immigration matters,[3] cannot be reconciled with this Court's holding in *Jean*.

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[3] The present case is the latest manifestation of a stark historical pattern of discriminatory treatment by immigration officials against Haitians seeking political asylum. For over 25 years, immigration officials have systematically denied Haitian refugees their right to the fair and impartial administration of our immigration laws. *See Sannon v. United States*, 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir. 1978) (denied right to a fair immigration court hearing); *Sannon v. United States*, 460 F. Supp. 458 (S.D. Fla. 1978) (denied notice of procedures to be used in court proceedings); *Nat'l Council of Churches v. Egan*, No. 79-2959-Civ-WMH (S.D. Fla. 1979) (denied right to work during pendency of their asylum claims); *Nat'l Council of Churches v. INS*, No. 78-5163-Civ-JLK (S.D. Fla. 1979) (denied access to information to support asylum claims); *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom., Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982) (denied right to be heard on asylum claims and subjected to a "Haitian Program"); *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (denied counsel and fair process in exclusion hearings by being shipped, like cattle, to remote areas of the United States); *Jean v. Nelson*, 472 U.S. 846 (1985) (denied right to

(Continued on following page)

The petition challenges this discrimination as well as the district court's failure to follow the Federal Rules of Civil Procedure when it ruled against petitioners on the merits without granting discovery, hearing, or trial; without construing the facts in the light most favorable to petitioners; and while considering only limited briefing on emergency motions for preliminary relief. The petition does not challenge the authority of the Department of Homeland Security (hereinafter "DHS")[4] to admit or remove aliens. Indeed, it does not even challenge the authority of the DHS to maintain a policy of detaining inadmissible aliens on a non-discriminatory basis. Apart from the procedural issue, the petition challenges only nationality and race discrimination in the *incarceration* of aliens *pending a determination of their claims to asylum*. As the record in this case demonstrates, immigration officials have illegally and unfairly discriminated against black Haitian nationals by implementing a policy of detaining Haitian asylum-seekers despite the relevant individual circumstances of their cases.

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individualized and impartial determination of parole pending adjudication of their asylum claims); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1520 (11th Cir. 1992) (Hatchett, J., dissenting) (been expeditiously repatriated, after interdiction, despite lack of adequate procedures to identify and protect those with valid persecution claims); *Molaire v. Smith*, 743 F. Supp. 839 (S.D. Fla. 1990) (denied procedural due process in immigration court); *McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991) (denied due process in programs aimed at benefiting immigrants).

[4] As noted earlier, the Department of Homeland Security has largely taken over the immigration authority of the now defunct Immigration and Naturalization Service (hereinafter "INS").

## B. The Becraft Haitian Detention Policy.

On December 3, 2001, approximately 185 Haitian nationals arrived off the coast of south Florida in a decrepit sailboat, the *Simapvivetzi* ("If I'm still alive, it's because of Jesus"). App. 7. The INS immediately detained the majority of these Haitians, placed them in removal proceedings, and interviewed them to determine if they had a "credible fear" of persecution in Haiti.[5] App. 7-8. Those who demonstrated a "credible fear" of persecution became immediately eligible for release on parole. Historically, at this point in the process, the INS in south Florida generally released such aliens on parole pending the final adjudication of their asylum applications.[6] App. 8, 26. Beginning in mid-December 2001, however, the INS reversed its general policy of release with respect to Haitian asylum-seekers. App. 8.

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[5] "Credible fear" is defined in the Immigration and Nationality Act ("INA") as a significant possibility of demonstrating eligibility for asylum. INA § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v).

[6] It is the government's policy to consider asylum-seekers who have passed their credible fear interviews as the lowest priority for detention. App. 26. The INS's "Detention Use Policy" provides, "Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided they do not pose a risk of flight or danger to the community." App. 26. Additionally, the government conceded that:

> In practice, the application of INS Detention Use Policy in the Miami District, because of limited detention space in that district, resulted in the parole of most arriving aliens found to have credible fear unless they were identified as posing a danger to the community because of a criminal record or other factors.

App. 26.

On or about December 14, 2001, Acting Deputy INS Commissioner Peter Michael Becraft adopted a new and secret detention policy for Haitians, which resulted in the detention of virtually all Haitian asylum-seekers in south Florida regardless of the manner in which they arrived in the United States. Specifically, Deputy Commissioner Becraft instructed the INS Office of Field Operations to adjust its parole criteria with respect to inadmissible Haitians arriving in south Florida. Under the new policy, arriving Haitian nationals would no longer be considered as "low priority" for detention under the longstanding INS Detention Use Policy. App. 27. Instead, Haitians would be paroled only upon the approval of INS Headquarters and only in cases where continued detention would result in unusual hardship to the individual alien. App. 8, 27. While adopting the Haitian policy, the INS made no changes with respect to asylum-seekers of any other nationality and continued routinely to release those who had passed their credible fear interviews.

The effect of the Haitian detention policy was dramatic and immediate. The release rate for Haitians who had passed their credible fear interviews dropped from *96 percent* in November 2001 to *6 percent* for the period December 14, 2001 to March 18, 2002. App. 97; R2-26-5. Altogether, INS officials in Miami requested approval to release only *five* individuals who had passed their credible fear interviews, all of whom were pregnant women.[7] App. 8, 27. The officials did not request approval for the more

[7] Ten unaccompanied minors were also released. Unaccompanied minors, however, are not generally subject to expedited removal and the credible fear process and therefore fall outside the scope of this case.

than 240 other Haitian asylum-seekers who had passed their credible fear interviews. *Id.* Indeed, INS officials failed to consider the individual merits of their release requests and instead either ignored the requests or quickly issued virtually identical boilerplate denials.[8] App. 80-81, 84; R1-4-Ex. 6. While denying release to Haitians, INS officials continued to release other asylum-seekers in the Miami District at an extremely high rate. The release rate for similarly situated non-Haitians remained at 95 percent during December 2001 and January 2002. App. 98.

The Becraft Haitian detention policy thus represents a radical departure from INS's prior policy, which did not make distinctions based on nationality or race and expressly favored the release of asylum-seekers of all nationalities who passed their "credible fear" interviews in the Miami District. Non-Haitians who demonstrate a credible fear of persecution now continue to be routinely paroled in the Miami District under the old Detention Use Policy. In contrast, the Becraft Haitian detention policy mandated that Haitian nationals—and only Haitian nationals—no longer be considered for parole. Unlike persons of other nationalities, the presumption for Haitians is continued detention, regardless of the individual's risk of flight or danger to the community.

For months after the Haitian detention policy was adopted, INS officials from the Miami District Office denied the existence of the policy to advocates and

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[8] Even Haitians who had been granted asylum and who could no longer be legally detained by INS were not immediately released. R2-39-21-23.

community leaders. App. 80-81, 88-89, 93-95. Indeed, in adjudicating release reques INS officials issued over ninety virtually identical boil late denials of parole, which did not mention the Haitian policy but instead claimed that Haitians were flight risks because they had failed to sufficiently prove their identity and because of unspecified "particular facts of [their] case[s]." App. 84, 93; R1-4-Ex. 6. In reliance on INS's claim that the Haitians had failed adequately to prove their identity, the Haitians' families and advocates made significant efforts to secure identity documents in the hopes of obtaining release. App. 95.

Only in March 2002 did INS officials finally acknowledge that they had indeed adopted a policy of continued detention for Haitians. According to Deputy Commissioner Becraft, he adopted the December 14, 2001 policy because of generalized concerns that there was going to be a "mass migration" of people arriving by boat from Haiti, that Haitians were risking their lives on the high seas, and that Haitians who arrived by boat were desperate and therefore might constitute flight risks. App. 8, 33-34. At no point did the Deputy Commissioner state that he adopted the Haitian detention policy because the Haitians had failed to sufficiently prove their identity as was claimed in their denials. Nor did any official ever state that the detained Haitians themselves posed a threat to national security.

Finally, according to the government, the President did not authorize the Becraft Haitian detention policy. Nor did the Attorney General, in this case, take action by promulgating regulations or otherwise authorizing the policy. Acting Deputy INS Commissioner Becraft was the highest level executive branch official who authorized the policy. R2-38-Ex. 1 at 4. The government created no

written document to communicate the policy to Miami INS officials but instead communicated the policy verbally and by electronic mail. App. 27.

## C. Proceedings Below.

1. On March 15, 2002, petitioners filed a class action petition for writ of habeas corpus and complaint for injunctive and declaratory relief, seeking to end the discriminatory treatment under the Becraft Haitian detention policy. App. 10. Petitioners simultaneously filed a motion to certify the class and an emergency motion for temporary restraining order and/or preliminary injunction or class writ of habeas corpus and for immediate hearing.[9] *Id.* Petitioners asserted that the government's actions violated (a) the neutral parole statutes and regulations, as interpreted by this Court in *Jean v. Nelson*, which required individualized determinations without regard to race or national origin; (b) the Due Process Clause of the Fifth Amendment; (c) the equal protection component of the Fifth Amendment; (d) the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, by not providing an accurate statement of the grounds of denial of parole requests; (e) the APA, in that the Haitian detention policy

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[9] Petitioners sought to certify the class of:

> All detained Haitian aliens in the Southern District of Florida who arrived on or after December 3, 2001, who are applying for admission into the United States, have passed their "credible fear" interviews with the Asylum Office of the INS, and are in detention pending removal proceedings, for whom a final order of removal has not been entered.

App. 13-14.

was a substantive rule that must be adopted through notice-and-comment rulemaking procedures; and (f) the APA, in that the government had unlawfully withheld agency action to which petitioners were entitled and had not acted in accordance with applicable statutes, regulations, and constitutional provisions. App. 14. Petitioners requested injunctive relief or a class writ of habeas corpus to compel the government to: (a) release petitioners and class members; (b) cease using race and/or nationality as a factor in parole determinations; (c) evaluate all pending and future parole requests on a case-by-case basis in accordance with the law; and (d) provide accurate notice of the reasons for the denial of release requests. App. 14-15.

2. Later that same day, on March 15, 2002, the district court issued an order directing the government to respond to the emergency motion by March 19, 2002 and directing petitioners to reply two days later. App. 10. On April 5, 2002, the court issued an order directing the parties to submit additional documentation, including additional information and documentation about the parole policy for Haitians and how it was communicated. *Id.* In response to that order, the INS submitted a declaration from Acting Deputy INS Commissioner Becraft and heavily redacted electronic mail messages, among other things. *Id.* Petitioners moved for leave to start discovery on May 7, 2002 to test the validity of the hotly disputed assertions in the Becraft declaration. App. 12. Petitioners also filed a motion to compel production of the redacted portions of the electronic mail messages. *Id.* On May 9, 2002, the Lawyers Committee for Human Rights submitted

an amicus brief in support of petitioners. *Id.* On May 14, 2002, the government filed a motion to dismiss in part and for summary judgment in part.[10]

3. On May 17, 2002, the court dismissed the case in its entirety. The court held no evidentiary hearing or trial, did not rule on petitioners' motion for leave to start discovery or motion to compel, did not rule on the motion for class certification, and dismissed the case on the merits before petitioners could commence discovery. App. 40. In dismissing the case, the court relied on facts asserted by the government—but strongly disputed by petitioners—and found that the issues were "fully briefed" when only preliminary briefs had been filed on petitioners' emergency motion for temporary restraining order and/or preliminary injunction or class writ of habeas corpus and for immediate hearing. App. 13. Because of its decision on the merits, the court denied as moot the government's motion to dismiss and for summary judgment. App. 40.

a. In its decision, the district court first determined that it had no jurisdiction except for habeas jurisdiction

[10] Additionally, on April 5, 2002, after petitioners filed suit in district court, the INS changed its detention policy to permit the release of certain Haitian asylum-seekers who arrived at the Miami airport or other ports-of-entry. App. 9. The INS never advanced any explanation for why Haitians who arrived by air had been included in the detention policy for three months. Unlike the December 14, 2001 policy, this policy change was put in writing. Under the policy, all Haitians in the credible fear asylum process who arrive by boat continue to be subject to detention, with the sole exception of some pregnant women. Haitians who arrive by airplane may now be released but are still subject to an "unusual hardship" standard and subject to burdensome "enhanced procedures" for release which INS (now DHS) does not apply to any other nationality.

under 28 U.S.C. § 2241. App. 16, 20. The court held that because the authority to grant parole is within the discretion of the Attorney General, and because 8 U.S.C. § 1252(a)(2)(B)(ii) restricts the jurisdiction to review discretionary decisions of the Attorney General, the court was without jurisdiction to consider the complaint for injunctive and declaratory relief—even though petitioners raised constitutional, statutory, and APA claims in the complaint and did not question any exercise of discretion. App. 18-20. The district court then determined that it had habeas jurisdiction pursuant to this Court's holding in *INS v. St. Cyr*, 533 U.S. 289 (2001). *Id.*

b.- As to the merits, the court first summarily denied petitioners' constitutional arguments, reasoning that excludable aliens have no rights or privileges under the Constitution. App. 20-23. The court then considered the lawfulness of the Haitian detention policy under the parole statute and regulations. The court found that the Becraft Haitian detention policy differentiated between nationalities, but held that the policy did not violate the parole statute or its regulations. App. 17, 28-37. In so doing, the court limited this Court's ruling in *Jean v. Nelson* to its facts, expressly asserting that this Court had "confined its ruling to the unique factual and procedural history of [that] case." App. 28. The court then distinguished *Jean*, concluding that *Jean*'s interpretation of the parole statute and regulations as requiring individualized determinations "without regard to race or national origin" did not apply in this case because Deputy Commissioner Becraft implemented national origin as a factor based on "specific policy concerns, including the goals of preventing a mass migration from Haiti and ensuring the presence of Haitian asylum-seekers at their removal hearings." App.

30. The court did not explain, however, how the existence of "specific policy concerns," even if valid, allowed lower-level immigration officials to discriminate against Haitian nationals as a group when this Court in *Jean* held that the parole statute and regulations *require* race- and nationality-neutral parole determinations.

Once the court concluded that the parole statute and regulations did not prohibit discrimination, the court considered the implemented detention policy. The court determined that (1) Acting Deputy Commissioner Becraft had the authority to promulgate the detention policy; (2) the government had advanced "a facially legitimate and bona fide reason" for the policy, in that the INS had adopted the policy to prevent a mass migration and save lives and because Haitians who arrived by boat were considered flight risks; and (3) INS officials continued to engage in case-by-case determinations of Haitian release requests. App. 32-37. The court made these determinations after accepting as true facts asserted by the government but disputed by petitioners, without aid of hearing or trial, and based solely on the parties' briefing in aid of emergency motions for preliminary relief.[11] Finally, the

[11] Specifically, the court accepted without question the government's assertions that (1) immigration officials were engaging in case-by-case determinations of Haitian release requests, App. 27, 36-37, and (2) INS officials adopted the Haitian detention policy for the reasons they claimed they did, App. 30, 33-34. Not only were these facts disputed, but the court also failed to address the evidence presented that contradicted these claims. In dismissing the case, the court, for example, failed to assume as true petitioners' material factual assertions that the INS deliberately denied the existence of the Haitian detention policy until March 2002, that INS officials issued numerous

(Continued on following page)

court concluded that the Haitian detention policy did not violate any of the rules under the APA. App. 37-39.

4. On May 24, 2002, petitioners filed a timely appeal to the United States Court of Appeals for the Eleventh Circuit. The court of appeals dismissed this appeal in summary fashion on February 20, 2003. In its two-page decision, the court of appeals simply recounted petitioners' claims and stated that it affirmed the district court's decision "based upon the district court's well-reasoned order of May 17, 2002, within which each of the[] issues is comprehensively resolved." On April 4, 2003, petitioners timely filed a petition for rehearing and petition for rehearing *en banc*. These petitions were denied on May 13, 2003.

### D. The Effects of the Haitian Detention Policy.

Haitian nationals in the proposed class have languished in detention and suffered irreparable harm as a result of their incarceration. R1-4-Ex. 7. Due to their incarceration, Haitian detainees have had extreme difficulty in retaining legal representation, and the vast majority have proceeded with their asylum claims without legal assistance. App. 84-88, 94; R2-19-Ex. 2 at 3-12; R2-40-Ex. 3 at 1. Because of the complexity of asylum law, unrepresented Haitians are far less likely to win asylum than represented asylum-seekers. R2-40-Ex. 3 at 1. Compounding the difficulty, asylum applications are written in English and must be completed in English. Yet almost

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parole decisions that contained false reasons for denial of parole, and that there was no evidence of a pending mass migration from Haiti.

none of the Haitians speaks, reads, or writes English. App. 87. Despite the strength of the Haitians' claims, many of their asylum applications contained only a few sentences and failed to adequately express the facts underlying their fear of return. App. 85-86.

Haitian detainees have been further harmed by the expedited nature of their asylum proceedings. To begin with, detained asylum applicants have their hearings scheduled on an expedited basis, while paroled asylum-seekers have their asylum hearings scheduled about a year after their parole, allowing them sufficient time to retain counsel and prepare their claims. *Id.* Yet INS officials have not only proceeded with the Haitian cases on an expedited basis, they have placed these cases on a special Haitian-only docket that is governed by more restrictive rules than the docket for detainees of other nationalities. App. 81, 86-87, 94; R2-19-Ex. 2 at 3.

## REASONS FOR GRANTING THE PETITION

This petition should be granted because there is a direct conflict between the decision below and this Court's decision in *Jean v. Nelson* on an issue of far-reaching importance to the nation—the ability of lower-level government officials to discriminate on the basis of race and/or national origin without a congressional mandate or a presidential order. The petition should also be granted because the lower courts' failure to assert federal question jurisdiction and otherwise follow the Federal Rules of Civil Procedure has deprived petitioners of meaningful review and is directly at odds with this Court's decisions in *Zadvydas v. Davis*, 533 U.S. 678 (2001), *Adickes v. S.H.*

*Kress & Co.*, 398 U.S. 144, 157-160 (1970), and *Walker v. Johnston*, 312 U.S. 275 (1941).

### A. The Decisions Below Directly Conflict With This Court's Decision in *Jean v. Nelson*.

The decisions of the district and court of appeals courts in this case are squarely at odds with this Court's holding in *Jean v. Nelson*. In *Jean*, this Court was faced with a constitutional challenge to a detention policy substantially similar to the policy at issue in this case. *Jean*, 472 U.S. at 848-50. Petitioners in *Jean*, the named representatives of a class of incarcerated Haitians who had been denied parole under the detention policy, argued that the policy "violated the equal protection guarantee of the Fifth Amendment because it discriminated against the petitioners on the basis of race and national origin." *Id.* at 849.

The *Jean* Court, however, found it unnecessary to reach the constitutional issue. Noting that courts must consider "nonconstitutional grounds for decision[s]" prior to reaching any constitutional questions, *id.* at 854, the Court looked first to the parole statute and regulations and held that they required what petitioners sought through constitutional argument, "nondiscriminatory parole consideration."[12] *Id.* at 855. Because (1) the parole statute and regulations provided a list of neutral criteria

[12] Although the precise wording has changed slightly over time, the parole statute and regulations considered in *Jean* are in all relevant respects identical to those at issue here. *Compare* 8 U.S.C. § 1182(d)(5)(A) (1982), *and* 8 C.F.R. § 212.5 (1985), *with* 8 U.S.C. § 1182(d)(5)(A) (2001), *and* 8 C.F.R. § 212.5 (2001), App. at 43-50.

for the granting of parole, (2) nationality-based criteria had been adopted in other INS regulations, and (3) the government itself conceded that the facially-neutral statute and regulations did not allow consideration of race or national origin, the Court held that immigration officials were required to make "individualized determinations of parole" and that they make these determinations "without regard to race or national origin." *Id.* at 855-57. The Court found it unnecessary to determine whether the equal protection component of the Constitution prohibited the consideration of race or national origin in parole determinations. The parole statute and regulations themselves prohibited the consideration of such factors. *Id.* at 857.

Indeed, any question that this Court definitively interpreted the parole statute and regulations as prohibiting immigration officials from considering race or national origin in parole determinations was put to rest by this Court when it assured petitioners that its nonconstitutional remedy was as potent as a constitutional one. The Court guaranteed petitioners that immigration officials, "while like all others bound by the provisions of the Constitution, *are just as surely bound by the provisions of the statute and of the regulations* (emphasis added)." *Id.* Since the unequal treatment complained of by petitioners was prohibited by the very parole statute and regulations the INS had been implementing, the Court assured petitioners that they were protected from discrimination despite the failure to reach the constitutional issue. *Id.* ("The fact that the protection results from the terms of a regulation or statute, rather than from a constitutional holding, is a necessary consequence of the obligation of all federal courts to avoid constitutional adjudication except

where necessary."); *see also id.* at 856 n.3 ("*The interpretation of INS regulations we adopt today* involves no *post hoc* rationalizations of agency action.") (emphasis added).

This Court's decision in *Jean* cannot be reconciled with the holding of the district and court of appeals below. Despite this Court's conclusion that the parole statute and regulations prohibit immigration officials from considering race or national origin when making parole determinations, the court of appeals in this case affirmed the district court's conclusion that Acting Deputy INS Commissioner Becraft could require the consideration of Haitian nationality in the adjudication of parole requests. After finding that the Haitian detention policy differentiated between nationalities, the district court simply dismissed *Jean* by stating:

> The crucial difference between *Jean* and the instant case is that, here, the Acting Deputy Commissioner has authorized a policy of denying parole to inadmissible Haitian nationals based on *specific policy concerns*, including the goals of preventing a mass migration from Haiti and ensuring the presence of Haitian asylum seekers at their removal hearings.

App. 30 (emphasis added). No other reasoning was given to distinguish the holding in *Jean*.

However, neither the district court nor the court of appeals attempted to explain how the existence of "specific policy concerns" allowed the Acting Deputy INS Commissioner to require the use of Haitian nationality as a factor in parole determinations when this Court in *Jean* held that the parole statute and regulations require INS officials to make nationality- and race-neutral parole

determinations. *Without expressly creating an exception*, statutory and regulatory language cannot be read both ways—to prohibit the use of race and nationality and, at the same time, to permit such discrimination when "specific policy concerns" arise. Immigration officials must abide by the law as it is written.

Moreover, it is not the case here that the "specific policy concerns" asserted by the government relate to the individual petitioners themselves or to the factors pertinent to their parole determinations (i.e., risk of flight or danger to the community). The government can deny aliens parole in cases where individual reasons exist to deny parole. But here, the government below urged that immigration officials should be able to discriminate broadly against Haitian nationals when policy factors unrelated to the petitioners' release requests are present. According to the government, the statute and regulations should allow them to keep petitioners in prolonged detention in order to deter possible future mass migrations and deaths on the high seas. In the government's view, it is irrelevant that the individual alien poses no danger to the community or risk of flight. Indeed, it is irrelevant that the *entire class* being denied parole itself poses no greater danger to the community or flight risk than other classes of aliens.

If the government desires to employ nationality and/or race as a factor in parole determinations, the solution is not to circumvent the law but to change it. The courts below refused to recognize the statutory and regulatory prohibition—affirmed by this Court in *Jean*—against using race and nationality as factors in determinations of parole. Because the decisions below cannot be squared

with this Court's holding in *Jean*, this Court should grant review to resolve the conflict.

### B. This Case Raises an Issue of National Importance Because the Decisions Below Endorse Nationality and/or Race Discrimination by Lower-Level Government Officials in the Face of Neutral Statutes and Regulations—Discrimination Never Before Permitted by this Court.

Even apart from failure of the courts below to follow this Court's precedent, this case warrants the Court's attention because of its unquestionable importance to the country. Despite facially-neutral statutes and regulations that require individualized determinations, the government asked the courts below to accept reasons for the denial of parole that are not only speculative but that have nothing to do with the individuals seeking parole. The lower courts accepted the government's arguments and determined that, notwithstanding the facially-neutral parole statutes and regulations, Acting Deputy INS Commissioner Becraft had the authority to require the use of Haitian nationality as a factor in parole determinations.[13] The courts' remarkable analysis thus invites lower-level immigration officials, in the absence of authorization from Congress or the President, to adopt policies regarding the incarceration of aliens—and unrelated to their

[13] In fact, Haitian nationality in the vast majority of cases was the decisive factor. As noted above, the only Haitian nationals released on parole were pregnant women and unaccompanied minors.

admission—that discriminate on the basis of nationality and/or race.

Moreover, the pernicious effects of the decisions below extend far beyond the sphere of this case, possibly allowing immigration officials to create national origin- and/or race-based policies in other areas of immigration law where Congress has required even-handed treatment and individualized determinations. So long as lower-level immigration officials are able to drum up specific policy concerns, they would be permitted to bypass the legislative process, disregard their duty to act in an individualized and nondiscriminatory manner, and initiate new discriminatory policies where none existed before. For example, notwithstanding facially-neutral statutes and regulations that require individualized determinations for the granting of asylum, naturalization, and work authorization, immigration officials could elect to withhold these benefits to a broad class of aliens, so long as policy reasons could be articulated for doing so.

Such actions, however, would violate not only the INA, but also the inviolable precept that laws are created by those with the authority to make them. While Congress has authority to discriminate on national origin grounds in the area of immigration, immigration officials do not have such authority *unless it is given to them* by Congress or unless it derives from the President's inherent power over immigration pursuant to INA § 212(f), 8 U.S.C. § 1182(f). Under the INA, only the President is expressly authorized to make nationality-based distinctions in the face of neutral statutes and regulations. 8 U.S.C. § 1182(f) (authorizing only the President to "suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate").

All executive officials lower than the President, including the Attorney General, are strictly bound by the neutral parole statute and regulations. Even though the Attorney General has broad powers to act in matters concerning immigration, neither he nor his subordinates have the authority to violate immigration statutes or INS regulations. *Bridges v. Wixon*, 326 U.S. 135 (1945) (courts may "inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law"); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (Attorney General cannot interfere with procedure established in INS regulations).[14]

### C. In Refusing to Assert Federal Question Jurisdiction and Otherwise Follow the Federal Rules of Civil Procedure, the Decisions Below Fail to Follow this Court's Decisions in *Zadvydas v. Davis*, *Adickes v. S.H. Kress & Co.*, and *Walker v. Johnston*.

The district court below concluded that 8 U.S.C. § 1252(a)(2)(B)(ii), which limits jurisdiction to review "decisions or actions" that are authorized as being "in the discretion of the Attorney General," applied to petitioners'

[14] A number of cases decided by the U.S. Court of Appeals for the Eleventh Circuit suggest that the Attorney General also has the authority to make nationality-based distinctions. *See, e.g.*, *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1427 (11th Cir. 1995); *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1507 (11th Cir. 1992). In each of these cases, however, the Attorney General was acting pursuant to his authority delegated by Congress. None of these cases suggest that the Attorney General could act in a way inconsistent with the INA.

claims and divested the court of all but habeas jurisdiction. App. 19-20. Asserting habeas jurisdiction, the court then denied petitioners discovery, as well as a hearing or trial. Instead, although only limited briefing on petitioners' motions for preliminary, emergency relief had been filed, the court ruled on the merits of petitioners' claims and accepted as true facts strongly disputed by petitioners. Each of these actions by the district court constitutes a failure to follow this Court's precedent as well as the Federal Rules of Civil Procedure.

### a. This Court's Decision in *Zadvydas v. Davis* Makes It Clear That the Jurisdictional Bar That Prevents Review of Discretionary Decisions Does Not Apply to Petitioners' Claims.

In concluding that 8 U.S.C. § 1252(a)(2)(B)(ii) applied to petitioners' claims, the courts below failed to follow this Court's recent decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001). In *Zadvydas*, this Court held that Section 1252(a)(2)(B)(ii) applies only to claims that seek review "of the Attorney General's exercise of discretion." 533 U.S. at 688. The provision does not apply, however, to questions concerning "the extent of the Attorney General's authority" with respect to any particular provision. *Id.*

In this case, petitioners do not raise any claims that seek review "of the Attorney General's exercise of discretion." *Id.* They do not question the weighing of the discretionary factors in their individual parole determinations, nor do they ask this Court to weigh—or reweigh—those factors and determine if their individual cases require release. Rather, petitioners question "the extent of the Attorney General's authority," asserting that the Acting

Deputy INS Commissioner was *prohibited by statute* from requiring the consideration of national origin in parole determinations. Whether or not such an official acted beyond the scope of his authority in requiring consideration of national origin is "not a matter of discretion" and thus does not fall within the jurisdictional bar at 8 U.S.C. § 1252(a)(2)(B)(ii).

As this Court explained with respect to the petitioners in *Zadvydas*:

> The aliens here . . . do not seek review of the Attorney General's exercise of discretion; rather, they challenge the extent of the Attorney General's authority under the . . . detention statute. And the extent of that authority *is not a matter of discretion.*

*Id.* (emphasis added). The courts below apparently conflated claims that seek review of discretionary decisions with claims that seek review of nondiscretionary matters *related to discretionary decisions*. As this Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), there is a marked difference between challenges to "substantively unwise exercise[s] of discretion" and "questions of law that [arise] in the context of discretionary relief." *St. Cyr*, 533 U.S. at 307-08. Whether the Haitian detention policy violated the facially-neutral parole statute and regulations, as well as the Constitution, is not a discretionary determination and review is thus not barred by 8 U.S.C. § 1252(a)(2)(B)(ii).

**b. Because the District Court Possessed Federal Question Jurisdiction, the District Court Erred in Reaching the Merits of Petitioners' Claims Without Providing Discovery or Trial.**

Because 8 U.S.C. § 1252(a)(2)(B)(ii) does not apply to petitioners' claims, the provision did not divest the district court of federal question jurisdiction under 28 U.S.C. § 1331. Therefore, because the district court had such jurisdiction, it was required under the Federal Rules of Civil Procedure (1) to rule on the government's motion to dismiss and for summary judgment while construing the facts in the light most favorable to petitioners and, (2) if the motion was denied, to provide petitioners with discovery and a trial. A court cannot dismiss a case before it goes to trial unless there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-160 (1970). Moreover, to rule on a motion to dismiss, a court must construe disputed facts in favor of the nonmoving party. To rule on a motion for summary judgment, a court must determine there are no genuine issues of material facts. FED. R. CIV. P. 56(c); *Adickes*, 398 U.S. at 157. In this case, the court did neither.

The district court in this case violated these fundamental rules by dismissing the case in its entirety after only a preliminary, emergency briefing on the merits and without permitting discovery. Once the court found that the parole statute and regulations did not prohibit national origin discrimination, the court determined there was a "facially legitimate and bona fide reason" for the discrimination. In so concluding, the court relied on facts

asserted by the government, but disputed by petitioners. Indeed, rather than determining whether there were genuine issues of material fact, the court ignored altogether material facts asserted by petitioners that contradicted the government's allegations. Although the court stated that it was not considering the government's motions to dismiss or for summary judgment, the court's action in dismissing the case effectively amounted to an improper grant of a motion for summary judgment or motion to dismiss.

Specifically, the court accepted without question the government's assertions that (1) INS officials were engaging in case-by-case determinations of release requests filed by Haitians; and (2) INS adopted the Haitian policy to prevent a mass migration and to save lives and because it believed that Haitians who arrived by boat were flight risks. App. 32-37. Petitioners disputed each of these factual assertions. Petitioners alleged and presented ample, credible evidence that INS officials were, in fact, not adjudicating release determinations on a case-by-case basis. App. 80-81, 84, 93; R1-4-Ex. 6. Petitioners also alleged and pointed to substantial evidence in the record demonstrating that the INS officials, in fact, did not adopt the Haitian policy for the reasons they claimed they did.[15] App. 68, 80-81, 88-89, 93-95; R1-4-Ex. 6. A court cannot dismiss a case in summary judgment fashion before trial and/or without permitting discovery on the assumption that facts asserted by the moving party—which are

[15] For example, the district court ignored evidence that INS officials kept secret the existence of the detention policy, even though such evidence tended to disprove the government's contention that the policy was implemented for deterrence purposes.

disputed by the nonmoving party—are true. *Adickes*, 398 U.S. at 157. Nor can it rule on a motion for summary judgment without making findings regarding whether there are genuine issues of material fact.

### c. Even if the District Court Were Limited to Habeas Jurisdiction, Petitioners Were Entitled to an Evidentiary Hearing.

Even if the district court was limited to habeas jurisdiction, it erred by failing to hold an evidentiary hearing to settle material disputed facts and it abused its discretion by denying petitioners discovery. A district court is obligated to hold an evidentiary hearing in a habeas proceeding. 28 U.S.C. § 2243 states: "When the writ of order is returned a day *shall* be set for hearing, not more than five days after the return unless for good cause additional time is allowed" (emphasis added). Courts have recognized a limited exception to this rule only when the habeas petition raises pure questions of law. *Walker v. Johnston*, 312 U.S. 275 (1941) (if there is an issue of fact upon return of habeas petition, court shall proceed "to determine facts of case by hearing testimony and argument"); *People ex rel. Herndon v. Nierstheimer*, 152 F.2d 453 (7th Cir. 1945) (court may dispose of case on basis of return and answer where only questions of law are presented).

Petitioners raised material factual allegations in their habeas petition that were then disputed by respondents. As stated above, petitioners asserted INS officials were not, in fact, giving Haitians case-by-case adjudications of release requests and the Becraft Haitian detention policy was not, in fact, adopted for any of the reasons claimed by INS. The district court expressly based its decision on the findings that Acting Deputy INS Commissioner adopted

the Haitian policy for the reasons he said he did and that "the deportation officers in Miami continued to review Haitians' parole requests on an individual, case-by-case basis." App. 36. Because the parties disputed important facts, the district court was required to hold an evidentiary hearing.

Additionally, the district court erred in not permitting petitioners to conduct discovery. A court has the discretion to permit discovery in habeas proceedings under 28 U.S.C. § 2241. Rule 6, Rules Governing Section 2254 Cases (permitting discovery under Federal Rules of Civil Procedure if granted by court in the exercise of discretion and for good cause shown); Rule 1(b) (permitting the application of Section 2254 rules to other habeas proceedings). The district court abused its discretion by denying petitioners the opportunity to conduct discovery. Petitioners moved for leave to start discovery, but the district court did not rule on their motion. R2-50, 51. Specifically, petitioners asked to be able to depose the officials who had submitted sworn declarations in the case. R2-50. Petitioners also asked to serve interrogatories and a request for production. R2-50, 51.

The discovery requests were directed at testing the veracity of the Acting Deputy INS Commissioner's reasons for adopting the Becraft Haitian detention policy as well as the claim that INS deportation officers were reviewing parole requests filed by Haitians on a case-by-case basis. The court ultimately decided the case based on these facts, even though they were keenly disputed by petitioners. It was an abuse of discretion for the court to base its decision on these key facts without permitting petitioners first to conduct discovery.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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August 11, 2003

**ERNEST MOISE, et al., Plaintiffs, HEDWICHE JEANTY, BRUNOT COLAS, et al., on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, versus JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, et al., Defendants-Appellees.**

**No. 02-13009**

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

*321 F.3d 1336; 2003 U.S. App. LEXIS 3162; 16 Fla. L. Weekly Fed. C 342*

**February 20, 2003, Decided**

**PRIOR HISTORY:** Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 02-20822-CV-JAL. Judge: Joan A. Lenard.

*Jeanty v. Bulger*, 204 F. Supp. 2d 1366, 2002 U.S. Dist. LEXIS 15368, (S.D. Fla. 2002)

**DISPOSITION:** AFFIRMED.

**COUNSEL:** For Hedwiche Jeanty, Appellant: Rebecca Sharpless, Florida Immigrant Advocacy Center, Inc., Miami, FL.

For Brunot Colas, Laurence St. Pierre, Appellant: Charles F. Elsesser, Jr., Florida Legal Services, Inc., Miami, FL.

For John M. Bulger, Appellee: M. Jocelyn Wright, Washington, DC.

For Michael Garcia, Attorney General, Immigration Service, Appellees: David V. Bernal, Civil Division, Washington, DC.

For United States Department of Justice, Appellee: Anne R. Schultz, Miami, FL.

For Lawyers Committee for Human Rights, Amicus: Douglas C. Gray, Kramer Levin Naftalis & Frankel LLP, New York, NY.

For Marie Guerrier, Darius Satune, Guerda Alexis, Intervenors: Rebecca Sharpless, Florida Immigrant Advocacy Center, Inc., Miami, FL.

**JUDGES:** Before WILSON and FAY, Circuit Judges, and LIMBAUGH*, District Judge.

**OPINION:** PER CURIAM:

Laurence St. Pierre[1] appeals the district court's order denying Petitioners' Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction or Class Writ of Habeas Corpus and Request for an Immediate Emergency Hearing, denying as moot the motion to certify the class, and dismissing the Class Action Petition for Writ of Habeas Corpus and Complaint for Injunctive and

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] Initially, four of the six petitioners who brought the underlying action in the district court were parties to this appeal. Junior Prospere, Hedwiche Jeanty, and Brunot Colas were removed to Haiti, however, and, as a result, were dismissed from this appeal. Thus, St. Pierre is the only remaining appellant, and we address the issues set forth herein as they pertain to her.

Declaratory Relief. St. Pierre challenges an Immigration and Naturalization Service (INS) policy implemented in December of 2001, which instructed the Miami INS office that no undocumented Haitian nationals arriving in South Florida were to be paroled without the approval of the INS headquarters. In reaching our decision, we considered (1) whether, given the jurisdictional bar set forth in 8 U.S.C. § 1252(a)(2)(B)(ii), the district court properly concluded that it had only habeas jurisdiction over the claims; (2) whether Peter Michael Becraft, the Acting Deputy Commissioner of the INS, validly exercised the attorney general's delegated authority over parole determinations when he implemented the Haitian detention policy; (3) whether the reasons given by the government for the implementation of the Haitian detention policy were facially legitimate and bona fide; (4) whether the district court erred by failing to conduct an evidentiary hearing or permit discovery; (5) whether the Haitian detention policy was exempt from the rulemaking requirements of the Administrative Procedures Act; and (6) whether the Fifth Amendment challenge to the Haitian detention policy was valid. After a thorough review of the record and the parties' briefs and after the benefit of oral argument, we affirm based upon the district court's well-reasoned order of May 17, 2002, within which each of these issues is comprehensively resolved. *See Jeanty v. Bulger,* 204 F. Supp. 2d 1366 (S.D. Fla. 2002).

AFFIRMED.

**HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated, Petitioners, vs. JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service; JAMES ZIGLAR, Commissioner, Immigration and Naturalization Service; JOHN ASHCROFT, Attorney General of the United States; IMMIGRATION AND NATURALIZATION SERVICE; and UNITED STATES DEPARTMENT OF JUSTICE, Respondents.**

**CASE NO. 02-20822-CIV-LENARD/SIMONTON**

**UNITED STATES COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

204 F. Supp. 2d 1366; 2002 U.S. Dist. LEXIS 15368; 15 Fla. L. Weekly Fed. D 303

May 17, 2002, Decided
May 17, 2002, Filed

**DISPOSITION:** Petitioners' Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction or Class Writ of Habeas Corpus, and for an Immediate Hearing denied. Class Action Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief dismissed. All motions not otherwise ruled upon by separate order denied as moot.

**COUNSEL:** For ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE, LAURENCE ST. PIERRE: JoNel Newman, Florida Justice Institute, Ira Jay Kurzban, Kurzban Kurzban Weinger & Tetzeli, Charles F. Elsesser, Jr.,

Florida Legal Services Inc, Rebecca Ann Sharpless, Florida Immigrant Advocacy Center, Miami, FL.

For ATTORNEY GENERAL, John Ashcroft, IMMIGRATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE: M. Jocelyn Lopez Wright, Mary Jane Candaux, Anthony C. Payne, United States Department of Justice, Washington, DC.

**JUDGES:** JOAN A. LENARD, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** JOAN A. LENARD

**OPINION:**

**ORDER DENYING PETITIONERS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION OR CLASS WRIT OF HABEAS CORPUS AND FOR IMMEDIATE HEARING, DENYING MOTION TO CERTIFY CLASS, AND DISMISSING CLASS ACTION PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

Petitioners journeyed the high seas to flee Haiti, with hopes of obtaining political asylum and discovering freedom in America. Rather than liberation, they find themselves confined in Miami detention facilities while their asylum applications remain pending. Understandably, Petitioners express confusion about their present circumstances, and they implore the Court to grant them freedom.

Yet, "no judge writes on a wholly clean slate".[1] A district court must apply the body of law found in statutes enacted by Congress, regulations and policies promulgated by the Executive, and the precedents handed down by the Supreme Court and appellate courts.

> Courts are the mere instruments of the law, and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

*Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 738, 866, 6 L. Ed. 204 (1824) (Marshall, C.J.).

Particularly in the area of immigration, which strikes at the heart of a nation's sovereignty, courts generally must defer to the laws established by Congress and administered by the Executive branch of government. Given the narrow scope of judicial review permitted in this

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[1] Justice Felix Frankfurter, *The Commerce Clause* 12 (1937).

area, Petitioners' cry for freedom needs to be directed to those representatives of the political branches responsible for enacting immigration laws and policies. Mindful of the limits on judicial power, the Court proceeds to wade through the complicated issues presented by the instant case.

## I. Factual and Procedural Background

On December 3, 2001, U.S. Coast Guard officials sighted a rickety and overloaded sailboat, the Simapvivetzi, off the coast of South Florida, near Biscayne National Park. The Coast Guard rescued approximately 167 Haitian nationals from the boat. Eighteen others swam to shore, and two more individuals reportedly drowned while attempting to swim to shore.[2] The Coast Guard turned over the 167 rescued Haitians to the custody of the Immigration and Naturalization Service ("INS"). The INS placed male detainees at Krome Detention Center, female detainees at Turner Guilford Knight Detention Center, and families at a local motel.

As none of the aliens arrived with proper entry documentation, they were legally "inadmissible" under the Immigration and Naturalization Act ("INA") and, therefore, were placed into expedited removal procedures. Each of the adults was referred for an interview with an INS

[2] The eighteen Haitian migrants who swam to shore were considered by the INS to be "present without inspection," rather than "arriving aliens," as were the aliens brought to shore by the Coast Guard. (Gov't Opp. to Pets.' Mot. for TRO/PI/Writ at 5 n.3.) As such, the eighteen who swam to shore were released from detention and are not parties to this action.

Asylum Officer to determine whether he or she had a "credible fear" of persecution if returned to Haiti. Each individual that passed the credible fear interview received a Form I-862 "Notice to Appear" for full non-expedited removal proceedings, including the opportunity to apply for asylum before an immigration judge.[3] At this point in the process, the INS typically releases aliens on parole pending the final adjudication of their asylum petitions.

Beginning in mid-December, 2001, the INS reversed its general presumption of release for undocumented Haitians arriving in South Florida. According to INS Acting Deputy Commissioner Peter Michael Becraft, officials from several Executive agencies had observed a sharp increase in dangerous maritime departures from Haiti and grew concerned over the potential for more loss of life and the threat of mass migration. (Becraft Decl. ¶ 8.) Based on consultations with other Executive officials, Becraft instructed the Miami INS office that no undocumented Haitian should be released without the approval of INS Headquarters. (*Id.*) Miami officials learned of the policy adjustment on or about December 14, 2001. (Lee Decl. ¶ 11.) Miami officials continued to review the cases of arriving Haitians and recommended to Headquarters the release of approximately fifteen Haitians, including pregnant women and unaccompanied minors, who arrived after December 3, 2001 (*Id.* ¶ 12.) On February 12, 2002,

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[3] The Government indicates that 165 of the 167 Haitian nationals rescued from the Simapvivetzi passed their "credible fear" interviews. (Gov't Opp. to Pets.' Mot. for TRO/PI/Writ at 5 n.3.) The other two were placed into expedited removal proceedings and are not parties to the instant action.

Miami officials received permission to release pregnant women and unaccompanied minors without obtaining Headquarters' approval. (2/15/02 e-mail of David J. Venturalla.) On March 8, 2002, the Miami office was authorized to release, without Headquarters approval, Haitians granted asylum where the INS decided not to appeal. (Becraft Suppl. Decl. ¶ 7.) On April 5, 2002, Executive Associate Commissioner for the Office of Field Operations Johnny N. Williams and Regional Director J. Scott Blackman authorized Miami officials to release Haitians who arrived by "regular means at a designated port of entry" (e.g. by airplane), pursuant to enhanced procedures for assuring the alien's likelihood of appearing at immigration proceedings. (*Id.* ¶ 9.)

Petitioners are four Haitian nationals who were rescued from the Simapvivetzi on December 3, 2001.[4] All four have passed their credible fear interviews yet remain

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[4] Originally, six named Plaintiffs/Petitioners filed this action. Subsequently, two of the original six were released from custody. The original lead Plaintiff/Petitioner, Ernest Moise, arrived aboard the Simapvivetzi. He and his family were granted asylum and released from detention on March 19, 2002. The Government filed a Motion to Dismiss Moise (D.E. 16) on March 20, 2002. Petitioners conceded that his claims are moot. (D.E. 29.) The Court granted the Motion to Dismiss Moise on May 10, 2002. (D.E. 57.) The other original named Petitioner, Peterson Belizaire, arrived by plane at Miami International Airport on December 17, 2001. He applied for parole on February 27, 2002, and his application was denied on April 4, 2002. After the INS changed its policy with regard to Haitians arriving by plane, Belizaire completed a new parole request form. Upon his sponsor's completion of an affidavit of support, Belizaire was released on parole on April 18, 2002. The Government filed a Motion to Dismiss Belizaire (D.E. 45) on April 26, 2002. Petitioners conceded that his claims are moot. (D.E. 53.) The Court granted the Motion to Dismiss Belizaire on May 10, 2002. (D.E. 57.)

in detention. Petitioners Jeanty, Colas, and Prospere applied for and were denied parole in late January, 2002. Petitioner St. Pierre submitted a letter requesting parole on February 7, 2002. On April 9, 2002, she submitted a parole request form and identified a sponsor. As of April 12, 2002, the sponsor had not submitted an affidavit of support, and Petitioner St. Pierre's parole request remained pending. (Lee Suppl. Decl. ¶ 12.)

On March 15, 2002, Plaintiffs/Petitioners filed a Class Action Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief (D.E. 1), an Emergency Motion for Temporary Restraining Order and/or for Preliminary Injunction or Class Writ of Habeas Corpus, and for an Immediate Emergency Hearing (D.E. 2), and a Motion to Certify Class (D.E. 5). The Government filed an Opposition to Petitioners' Motion to Certify Class (D.E. 13) and an Opposition to Plaintiffs' Emergency Motion for Temporary Restraining Order and/or for Preliminary Injunction or Class Writ of Habeas Corpus (D.E. 14) on March 18, 2002. Petitioners filed Replies on March 21, 2002. (D.E. 20, 21.)

Upon consideration of the briefs, the Court requested further information from both sides on April 5, 2002 (D.E. 30.) Pursuant to the April 5th Order, Petitioners submitted copies of the named Petitioners' parole requests (D.E. 34); the Government submitted copies of Petitioners' immigration files (D.E. 37); and Becraft and Lee submitted supplemental declarations (D.E. 38). The Government also submitted a copy of the INS's "Detention Use Policy," copies of electronic communications between INS officials regarding the policies toward Haitians arriving in South Florida, and copies of two memoranda, dated April 5, 2002, entitled "Procedures for Paroling Haitians Arriving by

Regular Means at a Designated Port of Entry in South Florida." (D.E. 39.)

Once the issues were fully briefed, the parties continued to file additional pleadings. Petitioners submitted a Notice of Filing of Supplemental Exhibits, including an advisory opinion issued by the United Nations High Commissioner for Refugees on April 15, 2002, and statements by social workers and legal personnel regarding the conditions at the detention facilities. (D.E. 40.) The Government moved to strike the supplemental argument as untimely, or, alternatively, to respond. (D.E. 46.) The Government also requested leave to file supplemental exhibits, including statements by Miami INS officials with respect to policies at the detention facilities. (D.E. 47.) Petitioners filed an Opposition to the Motion to Strike, maintaining that the international law issues raised in the advisory opinion are relevant, although conceding that they have not alleged international law claims.[5] (D.E. 58)

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[5] The opinion, issued by the UNHCR at the request of Petitioners' counsel, concludes that under international refugee law (including the 1967 Protocol relating to the Status of Refugees, to which the United States is a party), detention should not be used as a means of deterring asylum seekers from seeking protection in a given country, and that detention is arbitrary, and therefore illegal, when asylum seekers of a particular national origin are subject to more restrictive criteria for release from detention than those of other nationalities. (UNHCR Advisory Opinion at 7.) Petitioners state that the advisory opinion is "relevant to the present case" without addressing the issue of whether it constitutes binding authority in this Court. (Pets.' Not. of Filing Supp'l Exs. at 1.) Appellate courts, including the Eleventh Circuit, have held that the 1967 Protocol provides no enforceable rights in U.S. courts because it is not a self-executing treaty. *See Haitian Refugee Ctr., Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991); *Bertrand v. Sava*, 684 F.2d 204, 218 (2d Cir. 1982). As Petitioners concede that they have not

(Continued on following page)

On May 7, 2002, Petitioners filed an Emergency Motion for Leave to Take Depositions of Respondents and to Otherwise Begin Discovery and also to Shorten Time for Response to Petitioners' First Request to Produce. (D.E. 50.) On May 8, 2002, Petitioners filed a Motion to Compel, seeking to compel Respondents to produce the redacted portions of the documents submitted in response to the Court's April 5, 2002 Order. (D.E. 54.)

On May 9, 2002, the Lawyers' Committee for Human Rights ("LCHR") filed an Amicus Curiae Brief (D.E. 55).[6]

On May 14, 2002, the Government filed a Motion to Dismiss in Part and for Summary Judgment in Part, seeking dismissal of the Class Action Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief, or, alternatively, dismissal of claims 2 and 3 for

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alleged any cause of action under international law, the Court need not further address the conclusions of the advisory opinion.

[6] The amicus brief argues that Petitioners' detention violates international law, including the 1967 Protocol and the International Covenant on Civil and Political Rights ("ICCPR"), and alleges that continued detention will have an adverse impact on Petitioners' mental and physical well-being and their ability to present their asylum claims. The brief does not address whether the treaties are enforceable in U.S. courts. The law makes clear that neither the Protocol nor the ICCPR is a self-executing treaty, and, thus, neither provides enforceable rights in U.S. courts. *See supra* note 5; *United States v. Duarte-Acero,* 208 F.3d 1282, 1284 n. 8 (11th Cir. 2000) (ICCPR not self-executing); *Buell v. Mitchell,* 274 F.3d 337, 372 (6th Cir. 2001) (holding that ICCPR is not enforceable in U.S. courts). Moreover, the Complaint states no cause of action under international law, and the brief alleges no specific facts directed toward the current detention of Petitioners or any other Haitians in Miami. Therefore, the Court need not further address the amicus curiae brief.

lack of jurisdiction, and summary judgment on all other claims.[7] (D.E. 60.)

Upon consideration of the entire record in this matter, the Court finds that the issues were fully briefed in the Petitioners' Emergency Motion for Temporary Restraining Order and/or for Preliminary Injunction or Class Writ of Habeas Corpus, and for an Immediate Emergency Hearing (D.E. 2), Motion to Certify Class (D.E. 5), Government's Responses (D.E. 13, 14), Petitioners' Replies (D.E. 20, 21), and the parties' submissions in response to the Court's April 5th Order Directing to Submit Additional Documentation (D.E. 34, 37, 38, 39.) Accordingly, the Court finds as follows.

## II. Parties' Arguments

Petitioners seek a writ of habeas corpus on behalf of themselves and a class of:

> All detained Haitian aliens in the Southern District of Florida who arrived on or after December 3, 2001, who are applying for admission into the United States, have passed their "credible fear" interviews with the Asylum Office of the INS,

[7] The Government previously filed an Opposition to Petitioners' Emergency Motion for Temporary Restraining Order and/or for Preliminary Injunction or Class Writ of Habeas Corpus, responding in full to the Emergency Motion. (D.E. 14.) Petitioners seek the same relief in the Complaint (D.E. 1) and the Emergency Motion (D.E. 2). Therefore, the Court finds it unnecessary to consider the Government's Motion to Dismiss and for Summary Judgment, and rules upon the basis of the Emergency Motion and related pleadings.

> and are in detention pending removal proceedings, for whom a final order of removal has not been entered.

(Pets.' Mot. to Certify Class at 1.)

Petitioners argue that the Government has violated their rights pursuant to: (1) the parole statute and regulations, in that parole decisions were not made on a case-by-case basis; (2) the due process clause of the Fifth Amendment, as Petitioners have a right to be free from unlawful detention; (3) the equal protection component of the Fifth Amendment, because the Government has discriminated against them on the basis of race and/or national origin; (4) section 555(e) of the Administrative Procedures Act ("APA"), by not providing an accurate statement for the grounds of denial of parole requests; (5) APA § 553, in that the Government's new policy is a substantive rule that must be adopted through notice-and-comment rulemaking procedures; and (6) APA § 701, in that the Government has unlawfully withheld agency action to which Petitioners are entitled and has not acted in accordance with applicable statutes, regulations, and constitutional provisions.

Petitioners request this Court to issue a temporary restraining order, injunctive relief, or, in the alternative, a class writ of habeas corpus, to compel the Government to: (a) immediately release Petitioners and class members; (b) cease using race and/or nationality as a factor in adjudicating requests filed by Haitian asylum seekers who have passed their credible fear interviews or who are otherwise eligible to be considered for release; (c) evaluate all pending and future requests on a case-by-case basis; (d) re-evaluate all denied requests for release filed by Haitian asylum seekers since December 3, 2001, in accordance with the statute, the regulations, and the Constitution; (e)

provide accurate notice of the reasons for the denial of the release request; and (f) complete the above within ten days.

The Government opposes class action status on grounds that INA § 242(f)(1) prohibits the Court from granting class-wide relief or, alternatively, due to the fact-sensitive nature of Petitioner's parole applications. Further, the Government argues that the Court lacks jurisdiction, under INA § 242(a)(2)(B)(ii), over Petitioners' challenge to the Attorney General's discretionary decision to deny parole. With respect to habeas and injunctive relief, the Government contends that Petitioners have not shown a substantial likelihood of success on the merits, in that: (1) the Fifth Amendment provides Petitioners no relief; (2) the statute presumes the denial of parole, and the Government continues to make case-by-case decisions regarding Petitioners' parole requests; (3) the APA does not apply; (4) the Government has provided a "facially legitimate and bona fide" reason for denying Petitioners' parole applications; and (5) Petitioners have not shown that they will suffer irreparable harm in the absence of an injunction, or that the balance of hardships tips in their favor.

With its Response, the Government submitted declarations by Peter Michael Becraft, Acting Deputy Commissioner of the INS, and Wesley Lee, Officer in Charge of INS Krome Service Processing Center in Miami, Florida Becraft stated that after the arrival of 167 Haitians by boat on December 3, 2001, the Government feared a mass migration and sought to deter more Haitians from making the dangerous voyage. (Becraft Decl. ¶ 8.) Becraft asserted that after consulting with various INS officials, he directed the INS Office of Field Operations to adjust its parole criteria with respect to inadmissible Haitians arriving in

South Florida, and he instructed that no such Haitians should be paroled without the approval of INS Headquarters. (*Id.*)

In their Reply, Petitioners argue that Becraft lacks sufficient authority to establish a policy that discriminates against Haitians. According to Petitioners, "Only Congress, the President, or possibly the Attorney General has such authority." (Pets. Reply at 2.) They contend, and submit statistics purported to demonstrate, that there is no current Haitian migration crisis. The crux of Petitioners' argument is that the Supreme Court's decision in *Jean v. Nelson,* 472 U.S. 846, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985), requires the INS to make parole determinations in a non-discriminatory manner without treating Haitians different than other nationalities.

## III. Analysis

Initially, the Court must determine whether it has jurisdiction in view of the limits on judicial review of immigration matters imposed by Congress in 1996. The Court concludes that the statute precludes full-scale judicial review of Petitioner's parole applications, but habeas jurisdiction exists to determine the legality of Petitioners' detention.

Limited to habeas jurisdiction, the Court then examines the scope of legal protection available to Petitioners. The law makes clear that Petitioners, as arriving aliens, have no constitutional rights with respect to their immigration applications but, rather, only the rights granted by Congress and the Executive by statute or administrative regulation. By statute, Congress has delegated the authority over parole determinations to the Attorney General,

who has further delegated the power to certain high-level INS officials, including the Deputy Commissioner. Third, the Court finds that the Supreme Court's holding in *Jean v. Nelson* does not preclude the Government from adopting a parole policy that differentiates between nationalities. Fourth, the Court must determine whether Acting Deputy Commissioner Becraft has the authority to adjust parole policy. The Court concludes that the Attorney General has conferred all of his parole-related authority upon the Deputy Commissioner, and the Court thus analyzes the policy as if the Attorney General himself had promulgated it.

The case law establishes that the Court's scope of review is limited to determining whether the Government has advanced a "facially legitimate and bona fide reason" for its parole policies and decisions. Applying this extremely deferential standard, the Court next finds that saving lives, deterring mass migration, and ensuring the presence of inadmissible aliens at their immigration hearings are facially legitimate and bona fide reasons supporting the policy of granting parole to Haitians only in cases of unique hardship. Since Petitioners have not alleged that Miami officials have misapplied the policy in any individual case, the Court concludes that Petitioners' detention is legal.

Finally, the Court examines Petitioners' APA claims. First, the Court finds that it lacks jurisdiction to review Petitioners' individual challenges to their parole denials. The Court also rejects Petitioners' claim that formal notice-and-comment rulemaking is required, finding that the INS merely adjusted its general parole policy with regard to Haitians arriving in South Florida.

### A. Jurisdiction

Congress imposed several limitations on the scope of judicial review in the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA"). One such limitation provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review – (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). As the authority to grant parole is specified under INA § 212(b)(5)(A) to be within the discretion of the Attorney General, the Government contends that the Court has no jurisdiction over this matter.

The Supreme Court examined similar post-IIRIRA provisions of the INA in *St. Cyr v. INS,* 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), and concluded that the statute precludes federal courts from engaging in full-scale "judicial review" of the Attorney General's decisions, but does not strip them of habeas jurisdiction under 28 U.S.C. § 2241 to review the legality of executive actions. 121 S. Ct. at 2285-86. The *St. Cyr* Court noted that in the immigration context, "judicial review" and "habeas corpus" have historically distinct meanings. 121 S. Ct. at 2285 (citing *Heikkila v. Barber,* 345 U.S. 229, 97 L. Ed. 972, 73 S. Ct. 603 (1953)). The crucial difference is the limited scope of habeas review. *Id.* Given the historic use of section 2241 habeas jurisdiction as a means of reviewing deportation and exclusion orders, the Supreme Court found

Congress' failure to refer specifically to section 2241 to be particularly significant. 121 S. Ct. at 2286 n.36.

Apparently, the Tenth Circuit is the only appellate court that has addressed the issue of whether INA § 242(a)(2)(B)(ii) strips federal courts of habeas jurisdiction over challenges to INS parole determinations. *See Sierra v. INS,* 258 F.3d 1213 (10th Cir. 2001). Applying the reasoning of *St. Cyr,* the *Sierra* court held that federal courts retain jurisdiction over habeas challenges to parole determinations.[8] *Id.* at 1217-18. The Court agrees with the Tenth Circuit for a number of reasons. First, the Supreme Court in *St. Cyr* concluded that the phrase "jurisdiction to review" as used in INA § 242(a)(2)(C), does not preclude habeas review. The Court sees no reason why the same phrase, as used in INA § 242(a)(2)(B)(ii) should have a broader meaning. Both provisions were enacted simultaneously in section 306 of IIRIRA, and Congress did not explicitly mention section 2241 habeas review in either subsection. Thus, neither provision "speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *St. Cyr,* 121 S. Ct. at 2286. To the extent that Petitioners challenge the Attorney General's statutory and constitutional authority to refuse them parole allegedly without making case-by-case determinations, habeas jurisdiction exists to determine whether Petitioners are

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[8] *Sierra* involved the withdrawal of parole of a Mariel Cuban, which is covered by separate immigration regulations, yet the Tenth Circuit found no material difference between the situation in *Sierra* and a previous case involving a non-Mariel Cuban challenging the initial denial of parole, 258 F.3d at 1219 n.4. Likewise, this Court finds no material difference between *Sierra* and the present case. The same jurisdiction-stripping provision, INA § 242(a)(2)(B)(ii), is at issue here.

held in custody "in violation of the Constitution or the laws or treaties of the United States."[9] 28 U.S.C. § 2241(c)(3); *see Sierra,* 258 F.3d at 1217; *cf. Zavdydas v. Davis,* 533 U.S. 678, 121 S. Ct. 2491, 2497-98, 150 L. Ed. 2d 653 (2001) (holding that section 2241 habeas proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention). The Court limits the scope of its review accordingly.[10]

### B. Constitutional Rights of Excludable Aliens

"For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz,* 426 U.S. 67, 81, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). Courts " 'have long recognized the power to expel or

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[9] By contrast, the Court lacks jurisdiction over Petitioners' attempts to obtain full APA-style judicial review of the Attorney General's discretionary parole decisions. *See infra* section III.E.

[10] In the instant Emergency Motion, Petitioners seek a temporary restraining order, preliminary injunction, or, in the alternative, a class writ of habeas corpus. For the reasons set forth in this Order, the Court finds that it lacks independent jurisdiction over Petitioners' constitutional and APA claims apart from habeas jurisdiction under 28 U.S.C. § 2241. Habeas jurisdiction allows a court to equitably "dispose of the matter as law and justice require." 28 U.S.C. § 2243. Thus, a court granting a writ of habeas corpus may issue an injunction in aid of the writ. *See Pierre v. United States,* 525 F.2d 933, 936 (5th Cir. 1976) ("injunctive relief may be necessary to enforce the petitioners' right of liberty"); *United States v. Doherty,* 786 F.2d 491, 499 n.11 (2d Cir. 1986) (citing *Louis v. Nelson,* 544 F. Supp. 1004 (S.D. Fla. 1982)); *Moore v. DeYoung,* 515 F.2d 437, 447 (3d Cir. 1975). However, where a court has only habeas jurisdiction and determines that no writ shall issue, no separate basis exists for the issuance of injunctive relief.

exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo v. Bell,* 430 U.S. 787, 792, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 210, 97 L. Ed. 956, 73 S. Ct. 625 (1953)). "'Over no conceivable subject is the legislative power of Congress more complete.'" *Id.* (quoting *Oceanic Navigation Co. v. Stranahan,* 214 U.S. 320, 339, 53 L. Ed. 1013, 29 S. Ct. 671 (1909)). Thus, "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Id.* (quoting *Mathews,* 426 U.S. at 79-80).

Particularly with regard to aliens seeking initial admission to this country, the role of federal courts is limited. The Supreme Court "has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia,* 459 U.S. 21, 32, 74 L. Ed. 2d 21, 103 S. Ct. 321 (1982). Excludable aliens are "those who seek admission but who have not been granted entry into the United States. Even if physically present in this country, they are legally considered detained at the border". *Garcia-Mir v. Smith,* 766 F.2d 1478, 1483-84 (11th Cir. 1985). This is known as the "entry fiction." *Id.* Deportable aliens, by contrast, "have succeeded in either legally or illegally entering the country." *Id.* "Excludable aliens have fewer rights than do deportable aliens, and those seeking initial admission to this country have the fewest of all." *Id.* (citing *Landon,* 459 U.S. 21).

Despite Petitioners' physical presence in this country, neither detention nor parole affects their legal status as excludable aliens. *See* INA § 212(d)(5)(A) ("Parole of such alien shall not be regarded as an admission of the alien . . . "). As excludable aliens, Petitioners "have no constitutional rights with regard to their [parole] applications." *Garcia-Mir,* 766 F.2d at 1484 (citing *Jean v. Nelson,* 727 F.2d 957, 968 (11th Cir. 1984)). Rather, they possess only the statutory rights and privileges granted by Congress *See id.* Because the contours of such rights are "to be largely left to the discretion of the political branches," courts "should ordinarily abstain where excludable aliens are concerned."[11] *Id.* Thus, recognizing its narrow role, the

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[11] *Garcia-Mir* was part of lengthy litigation following the Mariel Boatlift of 1980, in which 125,00 [sic] Cubans participated in a mass exodus from Cuba to the United States. 766 F.2d at 1480. In *Garcia-Mir,* the Eleventh Circuit emphasized the importance of judicial deference to the political branches' decisions with respect to such a crisis: "In overriding the government's decisions about how best to handle the sudden influx of Mariel Cubans, the district court has failed to take account of those significant countervailing national concerns that have led our immigration law to place primary decisionmaking authority about such a problem squarely into the hands of the political branches." *Id.* at 1484. In the instant action, the Government asserts that the Haitian adjustment policy was adopted, in part, to avoid a mass migration from Haiti. (Becraft Decl. ¶ 8.) Petitioners contend and submit statistics to show that, unlike the Mariel Boatlift, there is no current Haitian migration crisis. (Pets.' Reply at 7-10.) Petitioners' argument, however, disregards the importance of the separation of powers concerns that mandate judicial deference. The same "significant countervailing national concerns" that prevented the *Garcia-Mir* court from second-guessing the Attorney General's decisions in response to the Mariel Boatlift also guide this Court. Executive officials have considerable knowledge and experience with respect to both the history and the current situation in Haiti and South Florida. Thus, the Court must allow them to make policy determinations at the outset in an

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Court looks to the statutes and regulations promulgated by the political branches to determine whether Government officials have acted within the scope of their statutory and delegated authority.

### C. Statutory and Regulatory Framework

#### (1) Statutory Authority for Detention of Arriving Aliens

An alien who arrives without the proper documentation required by the INA is inadmissible pursuant to INA § 212(a)(7), and subject to expedited removal procedures under INA § 235. Under INA § 235, an immigration officer shall order the removal of an arriving alien unless the alien indicates an intention to apply for asylum or a fear of persecution, in which case the officer shall refer the alien for an interview by an asylum officer under INA § 208(b)(1)(B). *See* INA § 235(b)(1)(A), 8 U.S.C. § 1225(b)(1)(A). If the asylum officer conducting the interview determines that the alien has a "credible fear" of persecution, the statute provides that "the alien shall be detained for further consideration of the application for asylum." INA § 235(b)(1)(B)(ii), 8 U.S.C § 1225(b)(1)(B)(ii). Thus, by statute, Congress has plainly indicated its intent and approval of the detention of an undocumented alien who has passed the credible fear interview, until adjudication of the asylum application.

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attempt to avoid what they perceive as a potential threat of another mass migration.

(2) Parole of "Credible Fear" Aliens

Notwithstanding the broad statutory authority for detention of "credible fear" aliens, the Attorney General's regulations authorize the INS to consider parole for such aliens. The regulations provide that an alien who has passed the credible fear interview shall receive a Form I-862, Notice to Appear, for full consideration of the asylum and/or withholding of removal claim in regular removal proceedings under INA § 240.[12] 8 C.F.R. § 208.30(f). In addition, the regulations provide that "parole of the alien may be considered only in accordance with [INA] § 212(d)(5) and [8 C.F.R.] § 212.5." 8 C.F.R. § 208.30(f).

By statute, Congress has delegated to the Attorney General the authority to make parole determinations, as follows:

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from

[12] At this point, the alien moves out of "expedited removal proceedings" under INA § 235, and into regular removal proceedings under INA § 240. A "credible fear" alien's petition for asylum is then adjudicated before an immigration judge at a removal hearing. Currently, Petitioners are in regular section 240 proceedings, awaiting their removal hearings.

> which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

Pursuant to this statutory authority, the Attorney General has promulgated 8 C.F.R. § 212.5 to govern parole determinations. By regulation, the Attorney General has delegated his parole authority, as follows:

> The authority of the Commissioner to continue an alien in custody or grant parole under [INA] § 212(d)(5)(A) shall be exercised by the district director or chief patrol agent, subject to the parole and detention authority of the Commissioner or her designees, which include the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director, any of whom in the exercise of discretion may invoke this authority under [INA] § 212(d)(5)(A).

8 C.F.R. § 212.5(a).[13]

With respect to aliens who have passed the credible fear interview, the regulations establish the following standard for parole determinations:[14]

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[13] Acting Deputy Commissioner Peter Michael Becraft acted pursuant to this authority when he instructed Miami officials to adjust the parole criteria for Haitians arriving in South Florida. (Becraft Decl. ¶ 2; Becraft Suppl. Decl. ¶ 7.)

[14] 8 C.F.R. § 212.5(b) governs parole for aliens in expedited removal proceedings. Once an alien moves into regular removal proceedings, *see supra* note 12, 8 C.F.R. § 212.5(c) applies.

> "The district director or chief patrol agent may, after review of the individual case, parole into the United States temporarily in accordance with [INA] § 212(d)(5)(A), any alien applicant for admission under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate."

8 C.F.R. § 212.5(c).

In furtherance of the regulations, in October, 1998, the INS issued a "Detention Use Policy" establishing the INS's priorities for the use of limited detention space. (Becraft Suppl. Decl. ¶ 5.) The Detention Use Policy defines four categories of aliens: (1) required detention (with limited exceptions); (2) high priority; (3) medium priority; and (4) low priority. With respect to "credible fear" aliens, the Detention Use Policy provides, "Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community." Such aliens fall within Category 4, or "low priority." The Government concedes that:

> In practice, the application of INS Detention Use Policy in the Miami District, because of limited detention space in that district, resulted in the parole of most arriving aliens found to have credible fear unless they were identified as posing a danger to the community because of a criminal record or other factors.

(Becraft Suppl. Decl. ¶ 6.)

(3) Haitian Policy Adjustment

Becraft states that on or about December 14, 2001, he adjusted the criteria of the Detention Use Policy for arriving Haitian nationals, pursuant to his delegated authority under 8 C.F.R. § 212.5(a). (Becraft Suppl. Decl. ¶¶ 2, 7.) As a result of this adjustment, arriving Haitian nationals would no longer be considered "Category 4" or "low priority" aliens under the Detention Use Policy. (*Id.* ¶ 8.) Specifically, Becraft instructed the INS Office of Field Operations that "no Haitian should be paroled without the approval of INS Headquarters." (*Id.* ¶ 7.) His instructions were conveyed to the Miami District both orally and via electronic mail. (*Id.*) After the issuance of Becraft's instruction, the Miami District continued to review the files of arriving Haitians and advised INS Headquarters of cases of "unusual hardship," including pregnant women and unaccompanied minors. (*Id.*) INS Headquarters approved parole releases for the cases of unusual hardship. (*Id.*) Beginning on February 15, 2002, the Miami office was allowed to release juveniles with approved sponsors and pregnant females, without requesting approval from Headquarters. (2/15/02 e-mail of David J. Venturalla.) The Miami office also informed Headquarters of individuals who had been granted asylum by an immigration judge where INS counsel had decided not to appeal the grant of asylum, and Headquarters approved the release of the asylees on March 18, 2002. (Becraft Suppl. Decl. ¶ 7.)

### D. Lawfulness of the Haitian Policy Adjustment

(1) *Jean v. Nelson*

According to Petitioners, the Supreme Court held in *Jean v. Nelson,* 472 U.S. 846, 86 L. Ed. 2d 664, 105 S. Ct. 2992 (1985), that the parole statute and regulations require the INS to make individualized parole determinations without regard to race or nationality. Upon closer examination, however, *Jean* establishes no such broad rule. The *Jean* majority expressly refused to address the constitutional issue and confined its ruling to the unique factual and procedural history of the case, as follows.

Until 1981, the INS followed a policy of general parole for undocumented aliens. *Id.* at 849. In the late 1970's and early 1980's, large numbers of undocumented aliens arrived in South Florida, mostly from Haiti and Cuba. *Id.* Concerned about the large influx of undocumented aliens, the Attorney General ordered the INS to detain without parole any alien who could not present a prima facie case for admission. *Id.* The petitioners, Haitian detainees who had been denied parole, filed a class action lawsuit. The district court held that the new policy of detention without parole must be promulgated in accordance with APA rulemaking procedures and ordered parole of the detained class, with certain exceptions. *Louis v. Nelson,* 544 F. Supp. 973 (S.D. Fla. 1982). The INS promptly promulgated 8 C.F.R. § 212.5.

On appeal, the Eleventh Circuit affirmed the district court's ruling on the APA claim. *Jean v. Nelson,* 711 F.2d 1455, 1483 (11th Cir. 1983) (hereinafter "*Jean I*"). In addition, the panel held that the Fifth Amendment's equal protection guarantee applied to the parole of unadmitted

aliens, and found that the district court's finding of no invidious discrimination was clearly erroneous. *Id.* at 1483-1503. Subsequently, the Eleventh Circuit granted rehearing en banc, thereby vacating the panel opinion. *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) (hereinafter "*Jean II*"). By then, the remaining petitioners were being held under the new regulations; thus, the en banc court held that the APA claim was moot. *Id.* at 962. The en banc court also reversed the panel on the constitutional issue, holding that the Fifth Amendment's equal protection guarantee does not apply to the parole of undocumented aliens. *Id.* at 968-75. Notwithstanding its constitutional holding, the en banc court concluded that an INS official's decision to deny parole may be subject to limited judicial review for abuse of discretion, and remanded to the district court for a determination of whether low-level INS officials had exercised their discretion in an individualized and non-discriminatory manner. *Id.* at 975-79.

The Supreme Court held that the Eleventh Circuit should not have addressed the constitutional issue, since the petitioners only sought to have the statutes and regulations applied in a non-discriminatory manner.[15] *Jean,* 472 U.S. at 854-55. In the Supreme Court, the government argued that it would be constitutionally permissible for the government to adopt different parole criteria for different nationalities, but also conceded that

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[15] Although the Supreme Court held that the appellate court in *Jean II* should not have reached the constitutional issue, the en banc holding regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds. *See Cuban Am. Bar Ass'n, Inc. v. Christopher,* 43 F.3d 1412, 1428 n.20 (11th Cir. 1995) (internal cites omitted).

both the statute and the newly issued regulations, on their face, required INS officials in the field to make race- and nationality-neutral parole determinations. *Id.* at 855-56. The Supreme Court adopted the petitioners' statement of the issue:

> This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes . . . and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement.

*Id.* at 853. With this narrow statement of the issue, the Supreme Court affirmed the Eleventh Circuit's remand for a determination of whether INS officials made parole determinations without regard to race or national origin, as the government conceded was required in that case. *Id.* at 857. The Supreme Court held neither that excludable aliens have any constitutional rights with regard to their parole applications, nor that the Executive must maintain nationality-neutral parole criteria as a policy matter.

The crucial difference between *Jean* and the instant case is that, here, the Acting Deputy Commissioner of the INS has authorized a policy of denying parole to inadmissible Haitian nationals based on specific policy concerns, including the goals of preventing a mass migration from Haiti and ensuring the presence of Haitian asylum seekers at their removal hearings. Accordingly, the Court must determine whether Becraft, as Acting Deputy Commissioner, has the authority to promulgate such a policy.

(2) Authority of Deputy Commissioner to Promulgate Policy

By statute, Congress has delegated to the Attorney General the authority to make parole determinations. *See* INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). Congress has also authorized the Attorney General to establish regulations and "perform such other acts as he deems necessary for carrying out his authority under the provisions of [the INA]." INA § 103(a)(3), 8 U.S.C. § 103(a)(3). In addition, the statute provides that, "[the Attorney General] may require or authorize any employee of the [INS] or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the [INS]." INA § 103(a)(4), 8 U.S.C. § 1103(a)(4).

Pursuant to statutory authority, the Attorney General has promulgated 8 C.F.R. § 212.5 to govern parole determinations. By regulation, the Attorney General has delegated the discretionary power to invoke the parole authority of INA § 212(d)(5)(A) to the INS Commissioner and certain designees, namely, the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director. 8 C.F.R. § 212.5(a). This provision was added to the regulations, effective January 29, 2001, in order to clarify that the parole authority vested in the Attorney General by INA § 212(d)(5) is delegated to the Commissioner, and that the parole power flows from the Commissioner to his designated subordinates without divesting the Commissioner or his subordinates of the delegated authority. *See* 65 Fed. Reg. 82254, 82254-55 (Dec. 28, 2000). Because the regulation explicitly delegates the Attorney General's parole authority to the

Deputy Commissioner, the Court analyzes the Haitian adjustment policy established by Acting Deputy Commissioner Becraft in the same manner as if the Attorney General himself had promulgated the policy.

(3) "Facially Legitimate and Bona Fide Reason"

Having determined that Acting Deputy Commissioner Becraft possesses sufficient authority to speak for the Executive branch, the Court reaches the heart of this dispute, namely, whether the Government is justified in adjusting its policy so as to result in the differential treatment of one national group. Here, the law makes clear that courts generally should defer to the Executive prerogative:

> 'There is little question that the Executive has the power to draw distinctions among aliens based on nationality.' . . . Aliens may be excluded on grounds that might be 'suspect in the context of domestic legislation,' because 'there are apparently no limitations on the power of the federal government to determine what classes of aliens will be permitted to enter the United States or what procedures will be used to determine their admissibility.'

*Cuban Am. Bar Ass'n,* 43 F.3d at 1427-28 (quoting *Jean II,* 727 F.2d at 978 n.30, 965 n.5).

Due to the political nature of decisions made by Congress and the Executive in the immigration area, the standard of review applicable to immigration decisions is extremely deferential. A federal court's scope of review is limited to ascertaining whether the Government has advanced "a facially legitimate and bona fide reason" for

its decision. *Garcia-Mir,* 766 F.2d at 1484-85 (citing *Jean II,* 727 F.2d at 977); *see also Cuban Am. Bar Ass'n,* 43 F.3d at 1427-28. Because the political branches share concurrent authority over immigration matters, the same narrow standard of review applies to actions taken by Congress or the Executive. *Jean II,* 727 F.2d at 976. With respect to parole determinations, the same standard applies to general policy decisions of high-level Executive officials and to individual determinations made by INS field officers. *See Garcia-Mir,* 766 F.2d at 1485.

*(a) The Policy Adjustment*

Acting Deputy Commissioner Becraft advances a number of justifications for the adjusted policy with respect to undocumented Haitians. First, he notes a sharp increase in maritime departures from Haiti beginning in November, 2001, when the Coast Guard reported interdicting vessels carrying a total of 350 Haitian nationals, in contrast to a total of 96 interdictions in the preceding three months. (Becraft Decl. ¶ 6.) After the Coast Guard rescued 187 Haitian nationals from the Simapvivetzi in early December, and the reported drowning of two others, Becraft explains:

> In the wake of this sharp increase in dangerous maritime departures from Haiti, consultations occurred among officials from several executive agencies and INS officials, including myself. In these consultations, the following concerns were discussed: (1) the possibility that the numbers of Haitians embarking in U.S.-bound boats would continue to increase and turn into a mass migration; (2) that the U.S. should take steps to discourage Haitians from contemplating dangerous voyages to the United States; (3) that paroling

> the migrants from the December 3 vessel might cause others to attempt dangerous maritime departures, placing themselves at risk, or trigger a mass migration from Haiti to the United States; (4) that adjusting the INS' parole criteria with respect to Haitians arriving by boat in South Florida, so that the parole criteria would be applied in a more restrictive manner, would be a reasonable step to take to address concerns (1) to (3) above; and (5) that the Haitians from the December 3 vessel, and other Haitians who might arrive in a similar fashion in South Florida, are less likely to appear for their immigration proceedings or for removal, if they ultimately received final orders of removal, given their demonstrated desperation to depart Haiti.

(Becraft Decl. ¶ 8.) Based on these considerations, Becraft states that he exercised his authority under INA § 212(d)(5) and 8 C.F.R. § 212.5(a), and instructed the Office of Field Operations to adjust its parole criteria with regard to inadmissible Haitians arriving in South Florida so that no Haitian would be released without INS Headquarters approval. (*Id.*) After Becraft's instructions were communicated to the Miami office, local officials continued to review the parole applications of arriving Haitians and released individuals with unusual hardships, such as pregnant women and unaccompanied minors. (Lee Decl. ¶ 12.)

When analyzing an Executive official's exercise of discretion, a court must avoid overriding the policy determination of the Attorney General's designee. *See Garcia-Mir,* 766 F.2d at 1485. The Court need not agree with the policymaker's choice nor approve of the policy reasons underlying it; rather, the Court must only ascertain

whether the Government has advanced a facially legitimate and bona fide reason supporting the decision. *See id.* (citing *Jean II,* 727 F.2d at 977). Here, the Court finds that preventing loss of life and avoiding a mass migration from Haiti are facially legitimate and bona fide reasons for detaining Haitian nationals who arrive by boat in South Florida. This conclusion is supported by the declaration of U.S. Coast Guard Lieutenant Bryan E. Clampitt, indicating that at least eighteen Haitian migrants died attempting to reach the shores of South Florida in the past year, in addition to the two who reportedly drowned attempting to swim ashore from the *Simapvivetzi.*[16] (Clampitt Decl. ¶¶ 4-5.) Lieutenant Clampitt also states that the Coast Guard interdicted approximately thirty vessels containing Haitian migrants between March 15, 2001 and March 15, 2002, and that almost all such vessels must be destroyed by the Coast Guard after interdiction, due to their unseaworthy condition. (*Id.* ¶ 3.) In light of such credible evidence from Executive officials of recurring loss of life and the potential for future danger and large-scale loss of life, the Court may not further scrutinize the policy choices made by the properly delegated Executive officials.

In addition, parole determinations normally take account of the possibility that an excludable alien may

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[16] In addition, the Coast Guard recently rescued 73 Haitian survivors from a 35-foot sailboat that capsized near the Bahamas. When the Coast Guard suspended its search for survivors on May 11, 2002, thirteen Haitians were reported dead, and another fourteen remained missing. *See* Anabelle de Gale, *One Body Recovered, but Search Suspended for Haitians at Sea,* Miami Herald, May 12, 2002.

abscond to avoid being returned to his or her home country. *See, e.g. Garcia-Mir,* 766 F.2d at 1485; *Bertrand,* 684 F.2d at 214-18. Here, Acting Deputy Commissioner Becraft concluded that Haitians arriving by boat would be less likely to appear for immigration proceedings, given their demonstrated desperation to leave Haiti. (Becraft Decl. ¶ 8.) The Court finds that this is a facially legitimate and bona fide reason to deny parole, and, therefore, the Court will not speculate as to whether the same goal could be achieved through alternative means.

*(b) Individualized Determinations*

Having determined that the Haitian adjustment policy is supported by a facially legitimate and bona fide reason, the only remaining question is whether low-level Miami officials implemented the policy as intended by the policymakers. The Officer in Charge of INS Krome Service Processing Center indicates that after receiving Becraft's instructions on December 14, 2001, the deportation officers in Miami continued to review Haitians' parole requests on an individual, case-by-case basis. (Lee Decl. ¶ 12.) Lee himself recommended to Headquarters the release of approximately fifteen Haitians with cases of unusual hardship, and Headquarters approved of parole in those cases. (*Id.*)

Petitioners do not allege that they are entitled to release under the adjusted policy. In addition, none of the named Petitioners' parole applications indicates any unusual hardship that would qualify for consideration by Headquarters. Based on the record, the Court finds that Miami officials have implemented the policy as established by high-level INS officials. Because the policy is supported

by a facially legitimate and bona fide reason, the Court concludes that the named Petitioners were properly denied parole.

### E. APA Challenges

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review." 5 U.S.C. § 702. However, judicial review is not available under the APA where otherwise precluded by statute. 5 U.S.C. § 701(a)(1). In the instant case, the INA precludes judicial review of any decision or action of the Attorney General "the authority for which is specified under [title II of the INA] to be in the discretion of the Attorney General." INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii). Thus, the APA does not provide a basis for Petitioners to challenge the Attorney General's exercise of discretion in denying their parole requests. *See, e.g., St. Cyr,* 121 S. Ct. at 2285-86.

Petitioners also argue that the INS's policy toward Haitians is subject to the APA's "notice and comment" rulemaking requirements, 5 U.S.C. § 533 *et seq.* Here, Petitioners claim that the Government's adjustment of policy violated the APA's statutory requirements, not that it constituted an abuse of discretion. Thus, INA § 242(a)(2)(B)(ii) does not preclude jurisdiction. The Court may address this claim under habeas jurisdiction because if the APA required notice-and-comment rulemaking for the policy pursuant to which Petitioners were held, their detention could be "in violation of . . . the laws . . . of the United States." 28 U.S.C. § 2241(c)(3). The Government

contends that the current policy toward Haitians is "merely an adjustment to the INS's Detention Use Guidelines, limited to one district." (Resp. at 31.) The Government maintains that its actions toward Haitians are exempt from the APA's rulemaking requirements under the "general policy statement" and "foreign affairs" exceptions.

The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . . " 5 U.S.C. § 551(4). As the definition of "rule" is quite broad, the APA provides a number of exceptions that permit promulgation of certain rules without recourse to the rulemaking procedures. One exception is for "general statements of policy," a term not defined by statute. 5 U.S.C. § 553(b)(3)(A). "A critical test of whether a rule is a general statement of policy is its practical effect in a subsequent administrative proceeding: A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." *Guardian Fed. Sav. & Loan Assoc. v. Fed. Sav. & Loan Ins. Corp.*, 191 U.S. App. D.C. 135, 589 F.2d 658, 666 (D.C. Cir. 1978), *cited with approval in Ryder Truck Lines, Inc. v. United States,* 716 F.2d 1369, 1377 (11th Cir. 1983); *Jean I,* 711 F.2d at 1480-83 (vacated as moot).

Here, the policy adjustment does not establish a binding norm because it does not finally dispose of an individual Haitian's parole application. The Detention Use Policy, which was not promulgated as a rule, specifically states, "Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens

found to have a credible fear of persecution. . . . " The adjusted policy does not negate the discretionary nature of the parole determination, and it does not prevent INS officials from granting parole. Instead, the adjustment only requires that Miami officials obtain Headquarters' approval before granting parole to a Haitian who did not arrive by regular means at a designated port of entry. The policy allows Miami officials to release pregnant women and juveniles with approved sponsors on parole without obtaining Headquarters approval, and it allows them to forward any other case of unusual hardship to Headquarters for approval. Even under the adjusted policy, each case receives individual consideration. Therefore, the adjustment does not establish a "binding norm," and it need not be promulgated as a rule under the APA.[17]

## IV. Conclusion

When Petitioners boarded the Simapvivetzi, they risked their lives in search of freedom and democracy in the United States. Paramount within our democratic values is the separation of powers among the three co-equal branches of government. The law teaches us that the power to control a nation's borders is so fundamental to its sovereignty that we must abide by the lawfully enacted policy decisions made by the Legislative and Executive branches, or seek change at the ballot box. In immigration matters, neither individuals nor the Court can substitute

[17] Because the Court finds that the Haitian policy qualifies for the "general statement of policy" exception to the APA rulemaking requirements, the Court need not decide whether the politically sensitive "foreign affairs" exception applies.

their policy perspectives for the judgments made by Executive officials, based upon facially legitimate and bona fide reasons, pursuant to statutory and delegated authority.

As the Court has determined that a writ of habeas corpus shall not issue, no basis exists for the issuance of a preliminary injunction or temporary restraining order, or any further action in this matter. Accordingly, it is

**ORDERED AND ADJUDGED** that:

1. Petitioners' Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction or Class Writ of Habeas Corpus, and for an Immediate Hearing (D.E. 2), filed March 15, 2002, is **DENIED**.

2. The Class Action Petition for Writ of Habeas Corpus and Complaint for Injunctive and Declaratory Relief (D.E. 1), filed March 15, 2001, is **DISMISSED**.

3. This case is **CLOSED**.

4. All motions not otherwise ruled upon by separate order are **DENIED AS MOOT**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 17 day of May, 2002.

**JOAN A. LENARD**

**UNITED STATES DISTRICT JUDGE**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 02-13009-DD

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HEDWICHE JEANTY,
BRUNOT COLAS,
et al.,

Plaintiffs-Appellants,

versus

JOHN M. BULGER, Acting Director for District 6,
Immigration and Naturalization Service,
MICHAEL GARCIA, Acting Commissioner,
Immigration and Naturalization Service, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court
for the Southern District of Florida

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***ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC***

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: WILSON and FAY, Circuit Judges and LIMBAUGH*, District Judge.

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* Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

**8 U.S.C. § 1182(d)(5)(A), I.N.A. § 212(d)(5)(A)**

**§ 1182. Inadmissible aliens**

(d) Temporary admission of nonimmigrants

* * *

(5)(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

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**8 U.S.C. § 1182(d) (1982), I.N.A. § 212(d) (1982)**

**§ 1182(d). Temporary admission of nonimmigrants**

* * *

(5)(A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall

forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

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**8 C.F.R. § 212.5**

**§ 212.5 Parole of aliens into the United States.**

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. . . .

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by the district director or chief patrol agent.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, the district director or chief patrol agent may, after review of the individual

case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) Conditions. In any case where an alien is paroled under paragraph (b) or (c) of this section, the district director or chief patrol agent may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. The district director or chief patrol agent should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as the district director or chief patrol agent may deem appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

* * *

**8 C.F.R. § 212.5 (1985)**

**§ 212.5 Parole of aliens into the United States.**

(a) In determining whether or not aliens who have been or are detained in accordance with § 235.3(b) or (c) will be paroled out of detention, the district director should consider the following:

(a)(1) The parole of aliens who have serious medical conditions in which continued detention would not be appropriate would generally be justified by "emergent reasons";

(a)(2) The parole of aliens within the following groups would generally come within the category of aliens for whom the granting of the parole exception would be "strictly in the public interest", provided that the aliens present neither a security risk nor a risk of absconding:

(a)(2)(i) Women who have been medically certified as pregnant;

(a)(2)(ii) Aliens who are defined as juveniles should only be placed in a juvenile facility or with an appropriate responsible agency or institution, recognized or licensed to accommodate juveniles by the laws of that State. A juvenile is generally defined as a person subject to the jurisdiction of a juvenile court. To determine what constitutes legal age or exceptions to the above definition in a particular State, the laws of the state where the alien is physically present will apply. Children of tender years who are too young to be placed in a juvenile facility or youth hall, and older juveniles who it is anticipated will remain in detention for a period longer than thirty days, should be placed with relatives or friends. In those extreme cases where it is impossible to accommodate a child of tender

years accompanied by an adult or juvenile who will or has remained in detention for periods of over 30 days, consideration should be given to paroling the juvenile with the accompanying adult to a responsible agency, relative, or friend. When it is determined that such juvenile should be paroled from detention, the following guidelines should be followed:

(a)(2)(ii)(A) Juveniles may be released to a relative (brother, sister, aunt, uncle) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that he has a relative who is in detention.

(a)(2)(ii)(B) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(a)(2)(ii)(C) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a nonrelative in detention who accompanied him on arrival, the question of releasing the minor and the accompanying nonrelative adult shall be addressed on a case-by-case basis.

(a)(2)(iii) Aliens who have close family relatives in the United States (parent, spouse, children, or siblings who are United States citizens or lawful permanent resident aliens) who are eligible to file, and have filed, a visa petition on behalf of the detainee;

(a)(2)(iv) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States:

(a)(2)(v) Aliens whose continued detention is not in the public interest as determined by the district director.

(a)(3) Aliens subject to prosecution in the United States who are needed for the purposes of such prosecution may be paroled to the custody of the appropriate responsible agency or prosecuting authority.

(b) In the cases of all other arriving aliens except those detained under § 235.3(b) or (c), and paragraph (a) of this section, the district director in charge of a port of entry may, prior to examination by an immigration officer, or subsequent to such examination and pending a final determination of inadmissibility in accordance with sections 235 and 236 of the Act and this chapter, or after a finding of inadmissibility has been made, parole into the United States temporarily in accordance with section 212(d) (5) of the Act any such alien applicant for admission at such port of entry under such terms and conditions, including those set forth in paragraph (c) of this section, as he may deem appropriate.

(c) Conditions. In any case where an alien is paroled under paragraph (a) or (b) of this section, the district director may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. The district director should apply reasonable discretion. The consideration of all relevant factors includes:

(c)(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances, and a bond may be exacted on Form I-352 in such amount as the district director may deem appropriate;

(c)(2) Community ties such as close relatives with known addresses; and (c)(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(d) Termination of parole – (d)(1) Automatic. Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (d) (2) of this section except that no written notice shall be required.

(d)(2) On notice. In cases not covered by paragraph (d) (1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole. Any further inspection or hearing shall be conducted under section 235 or 236 of the Act and this chapter, or any order of exclusion and deportation previously entered shall be executed. If the exclusion order cannot be executed by deportation within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director the public interest requires that the alien be continued in custody.

(e) Advance authorization. When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I- 512.

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**8 U.S.C. § 1252(a)(2)(B)(ii)**
**I.N.A. § 242(a)(2)(B)(ii)**

**§ 1252. Judicial review of orders of removal.**

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review

* * *

(B) Denials of discretionary relief Notwithstanding any other provision of law, no court shall have jurisdiction to review-

* * *

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter, to be in the discretion of the Attorney General, other than the granting of relief under section 1185(a) of this title.

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF FLORIDA**
**MIAMI DIVISION**

| | |
|---|---|
| ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE, and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated, | Case No. |
| Petitioners/Plaintiffs, | |
| vs. | |
| JOHN M. BULGER, Acting Director for District 6, Immigration and Naturalization Service, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN ASHCROFT, Attorney General of the United States, IMMIGRATION AND NATURALIZATION SERVICE, and UNITED STATES DEPARTMENT OF JUSTICE, | |
| Respondents/Defendants. | |

**CLASS ACTION PETITION FOR WRIT OF HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

1. Petitioners are Haitian asylum seekers detained in the Southern District of Florida under a policy of the Immigration and Naturalization Service (INS) that refuses them individualized determinations of their release requests and denies them release because of their race and/or national origin. On or about December 3, 2001, INS enforcement officials in South Florida began disregarding the facially neutral parole provision of the Immigration

and Nationality Act (INA) and INS regulations and commenced a policy of detaining all Haitian asylum seekers in the credible fear asylum process. Since December 3, 2001, INS has detained in custody over 240 Haitian asylum seekers in the credible fear asylum process and has released only three pregnant women and one man. Even in cases in which Haitians have been granted asylum by an immigration judge, INS has reserved appeal and refused to release the Haitians.

2. In November 2001, prior to the change in policy, INS officials in South Florida released 96 percent of all eligible Haitian asylum seekers in the credible fear asylum process. Those INS officials continue to release similarly situated asylum seekers of other nationalities at a high rate. They have released non-Haitian asylum seekers who arrived from December 1, 2001 to February 15, 2002 at a rate of 91 percent.

3. INS officials in South Florida have engaged in deliberate deception by denying the existence of the Haitian policy. They have also issued over a hundred deliberately false and misleading decisions denying Haitians release on parole. These decisions contain false reasons for denial and are an attempt to deceive the Haitians about the true reasons they are being refused release.

4. On behalf of themselves and all others similarly situated, Petitioners challenge their incarceration as violating the facially neutral parole provision of the INA and INS regulations, as well as the equal protection and due process protections of the fifth amendment to the United States Constitution. Petitioners further challenge

the INS policy of incarcerating Haitians as violating the Administrative Procedures Act (APA).

5. Petitioners, on behalf of themselves and all others similarly situated, request this Court to issue a preliminary injunction or, in the alternative, a class writ of habeas corpus to compel the Respondents to:

(a) immediately release Petitioners and class members who are being held unlawfully on account of their nationality and/or race;

(b) cease using race and/or nationality as a factor in adjudicating requests filed by Haitian asylum seekers who have passed their credible fear interviews or who are otherwise eligible to be considered for release;

(c) evaluate all pending and future requests for release on a case-by-case basis in accordance with 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the equal protection and due process protections guaranteed by the fifth amendment to the United States Constitution;

(d) reevaluate all denied requests for release filed by Haitian asylum seekers since December 3, 2001 in accordance with 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the equal protection and due process protections guaranteed by the fifth amendment to the United States Constitution; and

(e) provide accurate notice of the reasons for the denial of a release request; and

(f) complete (a) through (e) within ten (10) days.

## JURISDICTION

6. Jurisdiction is conferred on the Court under 28 U.S.C. § 2241, Art. I, §9, cl. 2 of the United States Constitution, 28 U.S.C. § 1361, 28 U.S.C. § 1331(a), and 5 U.S.C. §§ 701-706. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57 and 65.

## VENUE

7. Venue in the Southern District of Florida is proper pursuant to Title 28 U.S.C. § 1391(e) because Defendant John M. Bulger, Acting Director of District 6, Immigration and Naturalization Service, resides in the Southern District of Florida, as do all members of the Petitioner class.

## EXHAUSTION OF ADMINISTRATIVE REMEDIES

8. Petitioners have exhausted their administrative remedies. No statutory exhaustion requirements apply to Petitioners' claims.

## PARTIES

### Petitioners

9. Petitioner ERNEST MOISE is a Haitian asylum seeker detained by INS in Miami, Florida. He is detained with his minor children. Mr. Moise fled Haiti because members of the Lavalas political party threatened to kill him numerous times on account of his support of an opposing political party. Fearing for his own safety and the

safety of his family, Mr. Moise and his minor children fled Haiti by boat.

10. The boat arrived in the United States on December 3, 2001 and, upon its arrival, INS detained Mr. Moise and his children. Mr. Moise was interviewed by an officer of the INS Asylum Office and found to have a significant possibility of being eligible for asylum. The officer further found that he had sufficiently established his identity.

11. On January 23, 2002, Mr. Moise filed a written release request with INS requesting that he be released on temporary parole. On January 31, 2002, the INS denied this request, finding that Mr. Moise was a flight risk "based on the particular facts of [his] case, including manner of entry." The decision does not specify what "particular facts" or what about Mr. Moise's manner of entry makes him a flight risk. INS issued the decision on a standardized form containing five reasons for denial. INS indicated its reason for denial by putting a check mark next to the applicable reason.

12. On February 22, 2002, an immigration judge granted asylum to Mr. Moise and his two children. The INS reserved appeal and still refuses to release Mr. Moise.

13. Mr. Moise and his family are suffering substantial psychological harm due to their prolonged incarceration. He and his children are locked in one room during the day and night and have no contact with anyone besides INS officers. INS does not give them access to recreation. They are given food that they must eat in their room. The children are not provided with any education and have nothing to do besides play cards and watch television. They cry and ask their father why they are being detained and why they cannot go to school. Moreover, the

children are separated from their mother, who is detained at a different location.

14. Petitioner HEDWICHE JEANTY is a Haitian asylum seeker detained by INS at the Krome Service Processing Center in Miami, Florida. He fled to the United States after members of the Lavalas political party threatened to kill him and shot at his house due to his political activities.

15. On December 3, 2001, Mr. Jeanty arrived in the United States by boat and was detained by INS. An officer of the INS Asylum Office interviewed him and found that there is a significant possibility that he will be eligible for asylum. The officer further found that he had established his identity.

16. Mr. Jeanty submitted a letter requesting that he be released on temporary parole. INS denied this request in a letter dated January 28, 2002, finding that Mr. Jeanty was a flight risk "based on the particular facts of [his] case, including manner of entry." The decision does not specify what "particular facts" or what about Mr. Jeanty's manner of entry makes him a flight risk. INS issued the decision on a standardized form containing five reasons for denial. INS indicated its reason for denial by putting a check mark next to the applicable reason.

17. Mr. Jeanty is suffering significant harm from being detained. He is held in an overcrowded facility that is dirty and does not provide adequate clean clothes. Due to his inability to speak English and the lack of legal assistance at the detention center, he is confused by the legal process and, prior to the intervention of undersigned counsel, was unable to properly fill out his application for asylum. Moreover, he is subject to an expedited hearing

process on a special court docket for Haitians and is being deprived of a full and fair opportunity to present his asylum claim.

18. Petitioner BRUNT COLAS is a Haitian asylum seeker detained by the INS at the Krome Service Processing Center in Miami, Florida. He fled Haiti after he was attacked multiple times by members of the Lavalas political party due to his political activities. Mr. Colas arrived by boat in the United States on December 3, 2001 and was detained by INS. The INS Asylum Office found that there is a significant possibility that Mr. Colas will be eligible for asylum and that he had established his identity.

19. On January 15, 2002, Mr. Colas filed a written request for his release with Respondent John Bulger, Acting District Director. INS denied this request, finding that Mr. Colas was a flight risk "based on the particular facts of [his] case, including manner of entry." The decision does not specify what "particular facts" or what about Mr. Colas's manner of entry makes him a flight risk. INS issued the decision on a standardized form containing five reasons for denial. INS indicated its reason for denial by putting a check mark next to the applicable reason.

20. Mr. Colas has suffered significant harm on account of his detention. He is detained in overcrowded conditions and, prior to the intervention of undersigned counsel, Mr. Colas was unable to properly complete his application for asylum. Moreover, he is subject to an expedited hearing process on a special court docket for Haitians and is being deprived of a full and fair opportunity to present his asylum claim.

21. Petitioner JUNIOR PROSPERE is a Haitian asylum seeker detained by INS at the Krome Service Processing Center in Miami, Florida. He left Haiti because members of the Lavalas political party beat him and his brother and threatened to kill them on account of their support for an opposing political party. Mr. Prospere decided to flee Haiti.

22. On December 3, 2001, Mr. Prospere arrived in the United States by boat and was detained by INS. An officer of the INS Asylum Office of the INS interviewed him and found that there is a significant possibility that he will be eligible for asylum. The officer further found that he had established his identity.

23. Mr. Prospere submitted a letter requesting that he be released on temporary parole. INS denied this request, finding that Mr. Prospere was a flight risk "based on the particular facts of [his] case, including manner of entry." The decision does not specify what "particular facts" or what about Mr. Prospere's manner of entry makes him a flight risk. INS issued the decision on a standardized form containing five reasons for denial. INS indicated its reason for denial by putting a check mark next to the applicable reason.

24. Mr. Prospere is suffering significant harm due to his prolonged incarceration. The air conditioning at the detention center makes the air so cold and dry that his nose and ears bleed. INS fails to provide him with enough warm clothes and does not permit him to use a blanket for warmth during the day. He is also unable to obtain enough clean clothes and must wear the same uniform for up to one week Moreover, he is subject to an expedited hearing process on a special court docket for Haitians and is being

deprived of a full and fair opportunity to present his asylum claim.

25. Petitioner PETERSON BELIZAIRE is a Haitian asylum seeker detained by the INS at the Krome Service Processing Center in Miami, Florida. Mr. Belizaire fled Haiti after a member of the Lavalas political party threatened him and his family multiple times and his aunt was beaten to death. Mr. Belizaire arrived in the United States by plane on January 17, 2002 and was detained by INS. An officer of the INS Asylum Office of the INS interviewed him and found that there is a significant possibility that he will be eligible for asylum. The officer further found that he had established his identity.

26. On several occasions, Mr. Belizaire filed written requests for his release with INS. INS has not responded to Mr. Belizaire's requests and refuses to release him based on the INS illegal practice of not releasing Haitians alleged herein.

27. Mr. Belizaire is suffering substantial mental and physical harm as a result of his detention. He is detained in overcrowded conditions and has special medical needs due to back and knee injuries. These needs are not being met and, as a result, Mr. Belizaire suffers from chronic pain. Moreover, he is subject to an expedited hearing process on a special court docket for Haitians and is being deprived of a full and fair opportunity to present his asylum claim.

28. Petitioner LAURENCE ST. PIERRE is a Haitian asylum seeker detained by INS at the Turner Guilford Knight Correctional Center in Miami, Florida. She fled Haiti after she was beaten and raped by members of the Lavalas political party. Ms. St. Pierre was forced to leave

her children behind in Haiti. Ms. St. Pierre arrived by boat in the United States on December 3, 2001 and was detained by INS. An officer of the INS Asylum Office of the INS interviewed her and found that there is a significant possibility that she will be eligible for asylum. The officer further found that she had established her identity.

29. On February 7, 2002, Ms. St. Pierre filed a written request for her release with Respondent John Bulger, Acting District Director. Mr. Bulger has not responded to Ms. St. Pierre's request and refuses to release her based on the INS illegal practice of not releasing Haitians alleged herein.

30. Ms. St. Pierre is suffering substantial psychological harm from being detained. She was raped in Haiti and feels retraumatized by the experience of being in detention. Ms. St. Pierre is locked in a cell with no other people for long periods of time and is served food that is often spoiled or otherwise not edible. Only one of the detention officers speaks Creole, so she is often unable to understand what is happening. She is scared of some officers who yell at her. There is virtually no one to give legal assistance to her and the other Haitian women detained at the Turner Guilford Knight Correctional Center. Moreover, she is subject to an expedited hearing process on a special court docket for Haitians and is being deprived of a full and fair opportunity to present her asylum claim.

**Respondents**

31. Respondent JOHN M. BULGER is sued in his official capacity as the Acting Director for District 6 of the INS. As Acting District Director, he is a legal custodian of

Petitioners and responsible for adjudicating their release requests.

32. Respondent JAMES W. ZIGLAR is sued in his official capacity as the Commissioner of the INS, an agency of the U.S. Department of Justice. He is responsible for the administration of the INS and the implementation and enforcement of the immigration laws of the United States. He is a legal custodian of Petitioners and is responsible for overseeing the adjudication of their release requests.

33. Respondent JOHN ASHCROFT is sued in his official capacity as the Attorney General of the United States. He is responsible for the administration and enforcement of the immigration laws pursuant to 8 U.S.C. § 1103 and is a legal custodian of Petitioners. He oversees the unlawful policy of refusing release to Haitian asylum seekers on account of their race and/or nationality that is alleged herein.

34. Respondent IMMIGRATION AND NATURALIZATION SERVICE is an agency of the United States Department of Justice and is the agency responsible for enforcing the immigration laws.

35. Respondent UNITED STATES DEPARTMENT OF JUSTICE is a department of the executive branch of the United States government and is responsible for enforcing the immigration laws.

## CLASS ACTION ALLEGATIONS

36. Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(1) and (b)(2), Petitioners bring this action on behalf of themselves

and all other similarly situated individuals. The Petitioner class consists of:

> All detained Haitian aliens in the Southern District of Florida who arrived on or after December 3, 2001 who are applying for admission into the United States, have passed their "credible fear" interviews with the Asylum Office of the INS, and are in detention pending removal proceedings, for whom a final order of removal has not been entered.

37. The class is so numerous that joinder of all members is impracticable. There are more than 240 similarly situated individuals whom Respondents are illegally detaining. Moreover, the class will likely grow larger with time as additional individuals arrive and seek asylum in the United States.

38. The following questions of law and fact are common to the class:

> A. Whether as a matter of fact Respondents have failed to make individualized determinations of parole in the cases of Haitian asylum seekers since December 3, 2001.
>
> B. Whether as a matter of fact Respondents consider race and/or nationality as a factor in making determinations of parole in the cases of Haitian asylum seekers since December 3, 2001.
>
> C. Whether Respondents' policy of detaining Haitian asylum seekers is illegal in that it is based wholly or in part on the race and/or nationality of the detainees.

D. Whether Respondents' refusal to consider Haitian asylum seekers for release on a case-by-case basis is illegal.

39. The claims of the individual named Petitioners are typical of the claims of the class. Each named Petitioner is a citizen of Haiti detained in the Southern District of Florida who arrived on or after December 3, 2001. Each is seeking asylum and is eligible for consideration for release after having passed a "credible fear" interview. None has a final order of removal. Respondents have applied their unlawful detention policy to each named Petitioner.

40. Petitioners know of no conflict between their interests and those of the class they seek to represent. In defending their own rights, the individual Petitioners will defend the rights of all proposed class members.

41. The individual Petitioners are adequate representatives of the class because they have been adversely affected by Respondents' failure to consider their release in a lawful manner.

42. Petitioners' attorneys from the Florida Immigrant Advocacy Center, Inc., Kurzban, Kurzban, Winger & Tetzeli, P.A., Haggard & Parks, P.A., Florida Justice Institute, Inc., and Florida Legal Services, Inc. are experienced attorneys who have the resources to represent the class as a whole.

43. Respondents have failed to act on grounds generally applicable to each member of the class, in that they have failed to follow the law when considering Petitioners for release. It is therefore appropriate for this

Court to grant a temporary restraining order and preliminary injunction, or, in the alternative, issue a class writ of habeas corpus, as requested by Petitioners.

## THE DETENTION AND RELEASE OF ASYLUM SEEKERS

44. Regardless of race or nationality, aliens have a right to seek asylum in the United States if they have suffered past persecution or have a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. *See* 8 U.S.C. § 1158, 8 C.F.R. § 208. *See also* 8 U.S.C. § 1231(b)(3), 8 C.F.R. § 208.16 (applicants also have right to seek "withholding of removal" if their life would be threatened if returned to their home countries).

45. Aliens who arrive at a U.S. port-of-entry or who are interdicted at sea and brought to the United States are subject to an "expedited removal" process which does not automatically include a court hearing. *See* 8 U.S.C. § 1225(b)(1)(A) (2001). If an INS inspecting official determines that an individual is not entitled to enter the United States, the official will summarily return him or her to the country from which he or she came. *See* 8 U.S.C. § 1225(b)(1)(A)(i). The law, however, forbids the INS from summarily removing anyone who asks for asylum or who expresses a fear of returning to his or her home country. *See* 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. § 235.3(b)(4).

46. INS is required to detain those who request asylum or who express a fear of return and refer them to the Asylum Office of the INS for an interview. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV); 8 C.F.R. §§ 208.30, 235.3. At this interview, an INS Asylum Officer interviews the asylum

seeker to determine whether the person has a "credible fear of persecution" upon return to his or her home country. 8 U.S.C. § 1225(b)(1)(B)(ii). A "credible fear of persecution" means that there is a significant possibility that the applicant will establish eligibility for asylum. *See* 8 U.S.C. § 1225(b)(1)(B)(v).

47. If the asylum seeker passes this "credible fear" interview, he or she becomes eligible for release under 8 U.S.C. § 1182(d)(5)(A) pending the adjudication of his or her asylum claim in court. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Release under this provision is not an admission into the United States, but a "temporary parole" during the pendency of the asylum case. 8 U.S.C. § 1182(d)(5)(A).

## FACTUAL ALLEGATIONS

48. Immediately prior to the circumstances giving rise to this case, Miami INS officials properly considered asylum seekers of all nationalities for release and generally granted temporary parole within days or weeks of their becoming eligible for release. Of the 26 Haitians who arrived in November 2001 and passed their credible fear interviews, 25 were released, making the release rate 96 percent. INS released 89 percent of non-Haitian asylum seekers who arrived in November 2001 and passed their credible fear interviews.

49. On or about December 3, 2001, Miami INS officials abandoned the policy of considering Haitian asylum seekers for temporary parole on a case-by-case basis and commenced a policy of denying release to this class on account of race and/or nationality.

50. Respondent John M. Bulger, the Acting District Director for INS District 6, has directed Miami INS officials not to release Haitian asylum seekers.

51. To date, INS has released virtually no Haitian asylum seekers who arrived after December 3, 2001. Petitioners are aware of only three pregnant women and one man in the credible fear asylum process who have been released. There are now at least 240 Haitian asylum seekers who have passed their credible fear interviews and are detained in Miami, Florida. The majority of the Haitian asylum seekers are detained at Krome Service Processing Center. More than 45 female detainees are held at the Turner Guilford Knight Correctional Center, and at least 30 individuals are detained at a local hotel. Due to Respondents' new Haitian policy, Krome Service Processing Center has become overcrowded and newly arriving Haitian asylum seekers are transferred to remote locations such as New Jersey.

52. INS's denial of parole requests submitted by Haitians is part of a policy of discrimination based on race and/or nationality. While denying release to Haitians, INS continues to release similarly situated asylum seekers of other nationalities and races. INS released 95 percent of similarly situated non-Haitians who arrived in December 2001 and January 2002; and, 84 percent of those who arrived between February 1 and 15, 2002.

53. The detained Haitians have the same type of documentation of their identity as Haitians whom INS released prior to December 3, 2001 and asylum seekers of other nationalities whom INS is currently releasing.

Moreover, the INS Asylum Office has found that Petitioners and class members have sufficiently established their identity.

54. Since December 3, 2001, at least 186 Haitian asylum seekers have filed written requests for parole. INS officials have not granted any of these requests, and, to date, INS has denied at least 90 such requests.

55. In each of the 90 denials, INS issued boilerplate written decisions stating virtually identical reasons for denial. The majority of the decisions state that the Haitian applicant failed to establish that he or she would likely appear for a hearing 1) because he or she failed to sufficiently establish identity and 2) "based on particular facts of [his or her] case." A minority of the decisions state only the second reason. The denial decisions contain no indication of how INS arrived at its conclusions or why identical conclusions were reached in each decision.

56. The denials are false and misleading and an attempt to mask the real reason that the INS is denying release. As stated herein, the INS is denying release pursuant to a policy that denies Haitian asylum seekers individualized determinations on their release requests and refuses release on account of their race and/or national origin.

57. In addition to issuing false decisions denying release, INS officials provided false and misleading information for months regarding INS release policy for Haitians in a deliberate attempt to mislead advocates about how INS was handling Haitian cases. Only on March 9, 2002 did Acting INS Miami District Director John Bulger acknowledge that INS has a policy of denying release to Haitians.

58. The INS policy of refusing to make parole determinations for Haitian detainees on a case-by-case basis has had a severe impact on the Haitian detainees. They are being held in detention while they would otherwise be released and are suffering significant harm as a result of the conditions of their detention. The conditions in which the male Haitians are held are overcrowded and unsanitary. INS does not provide educational classes or recreation to children who are detained with their families in a motel. Some children are separated from their mother. Families are locked in a room all day and night. The conditions in which female detainees are being detained at the Turner Guildford Knight Correctional Center are even worse. The women are locked in cells frequently and for extended periods of time. They have limited access to recreation and are subject to searches upon returning from recreation. During the night, they are woken up every hour for security checks. Medical care is inadequate and the food is sometimes inedible. Only one officer speaks Creole, making it virtually impossible for the women to understand the officers. Some officers have subjected the women to verbal abuse.

59. As a direct result of their continued incarceration, the Haitian detainees have significant difficulty in retaining legal representation in their asylum cases and have extreme difficulty preparing, or assisting in the preparation of, their asylum claims. The immigration court has refused to give the Haitians sufficiently long continuances to permit nonprofit agencies and *pro bono* attorneys to help them. As a result, the vast majority of the Haitians are proceeding with their asylum applications without representation.

60. Almost all of the Haitians do not speak, read, or write English and are unable to complete applications for asylum, which are in English and must be completed in English. In some instances, detention officers with no training in asylum law have been filling-out asylum applications for some of the detainees. Despite the strength of the Haitians claims, many of their asylum applications contain only a few sentences and fail to adequately express the facts underlying their fear of return due to the fact that the Haitians do not know English and have no legal assistance. Some Haitians were ordered removed by immigration judges because they were unable to obtain legal assistance and could not fill out their asylum applications.

61. Haitian detainees have been further harmed by the expedited nature of their asylum proceedings. Asylum applicants in detention have their hearings scheduled on an expedited basis while paroled asylum seekers have their asylum hearings scheduled about a year after their parole, allowing them sufficient time to prepare their claims. The immigration court has set up a special Haitian docket that is governed by more restrictive rules than the immigration court docket for other detainees.

62. Additional immigration judges have been detailed to Krome Service Processing Center solely to hear the cases on the Haitian docket. On this docket, each judge is scheduled to hear up to five short hearings a day. Some of these hearings are scheduled for half-hour hearings, whereas non-Haitian cases are routinely set for three-hour hearings. Even in cases in which Haitians are represented by counsel, their cases are scheduled for merits hearings in one-hour time slots despite the objection of counsel. Immigration judges are also unable to grant continuances

of more than four weeks on the Haitian docket. No such restriction applies to cases on the non-Haitian docket. Approximately fifty Haitians have already been ordered deported by the immigration judge and numerous others are scheduled for merits hearings in the coming days and weeks.

63. Petitioners are informed and believe that the above-mentioned facts are part of a conscious plan to treat Haitian asylum seekers in the Southern District of Florida differently than immigrants from other countries and to expedite their removal from the United States without regard to the validity of their individual asylum claims.

## IRREPARABLE INJURY

64. Petitioners and class members have a fundamental right to be free from unlawful detention. Respondents are unlawfully detaining Petitioners on account of their race and/or nationality. Due to Respondents' unlawful detention of Petitioners, Petitioners have suffered, are suffering, and will continue to suffer irreparable harm.

65. Petitioners have been illegally detained for months. They are suffering significant harm from the conditions in which they are being detained. INS holds the male detainees in conditions that are overcrowded and unsanitary. Children are not given education or recreation and some are separated from their mother. Families are locked in a room all day and night. The conditions in which female detainees are being detained at the Turner Guildford Knight Correctional Center are even worse. The women are locked in cells frequently and for extended periods of time. They have limited access to recreation and are often subject to strip searches. During the night, they

are woken up every hour for security checks. Medical care is inadequate and the food is often inedible. Only one officer speaks Creole, making it virtually impossible for the women to understand the officers. Some officers have subjected the women to verbal abuse.

66. Because of their continued incarceration, Petitioners are unable to adequately present their claims for asylum and are subject to expedited hearings on a separate Haitian docket that has restrictive rules. The immigration court has refused to give the Haitians sufficiently long continuances to permit nonprofit agencies and *pro bono* attorneys to help them. As a result, the vast majority of the Haitians are not represented and many of them are proceeding with asylum applications that do not fully express their fear of returning to Haiti. At least fifty Haitians have already been ordered deported by the immigration judge and numerous others are scheduled for merits hearings in the coming days and weeks. Some Haitians had their asylum applications deemed abandoned and were ordered removed by immigration judges because they were unable to obtain legal assistance and complete their asylum applications.

## NO ADEQUATE REMEDY AT LAW

67. Petitioners have no administrative remedy to be exhausted and have no adequate remedy at law.

## ATTORNEYS' FEES AND COSTS

68. As a result of Respondents' unlawful conduct, Petitioners were required to retain counsel and incur reasonable costs, fees, and expenses in prosecuting this

case. Petitioners intend to seek fees, costs, and expenses under the Equal Access to Justice Act.

**FIRST CLAIM FOR RELIEF**

(Violation of 8 U.S.C. § 1225(d)(5)(A) (2001) and 8 C.F.R. § 212.5)

69. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

70. Respondents have violated and continue to violate 8 U.S.C. § 1225(d)(5)(A) and 8 C.F.R. § 212.5 in that they have refused and continue to refuse to make parole decision on a case-by-case basis and have made and continue to make parole decisions based wholly or in part on race and/or national origin.

71. As a result of Respondents' violation of 8 U.S.C. § 1225(d)(5)(A) and 8 C.F.R. § 212.5 Petitioners and class members have been unlawfully detained without a determination of the propriety of release in accordance with the law.

**SECOND CLAIM FOR RELIEF**

(Violation of the due process clause of the fifth amendment to the United States Constitution)

72. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

73. Petitioners and class members have a right to be free from unlawful detention which is protected by the due

process clause of the fifth amendment to the U.S. Constitution. Respondents violate Petitioners' right to due process in that they have refused to make individualized determinations on Petitioner and class members' parole requests without regard to race or national origin.

74. As a result of Respondents' due process violation, Petitioners and class members have been unlawfully detained without a determination of the propriety of release in accordance with the law.

**THIRD CLAIM FOR RELIEF**

(Violation of the equal protection component of the fifth amendment to the United States Constitution)

75. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

76. Petitioners and class members have a right to be free from unlawful detention which is protected by the due process clause of the fifth amendment to the U.S. Constitution. Respondents are in violation of the equal protection component of the fifth amendment in that they are engaged in a policy and practice of race and/or national origin discrimination against Petitioners and class members.

77. As a result of Respondents' equal protection violation, Petitioners and class members have been unlawfully detained without a determination of the propriety of release in accordance with the law.

## FOURTH CLAIM FOR RELIEF

(Violation of the Administrative Procedures Act, 5 U.S.C. § 555(e))

78. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

79. Respondents are in violation of the Administrative Procedures Act, 5 U.S.C. § 555(e) in that they have maintained a policy and practice of denying release to Petitioners and class members without providing an accurate statement of the grounds for denial.

80. As a result of Respondents' violation of 5 U.S.C. § 555(e), Petitioners and class members have been unlawfully deprived of knowing the true reasons of their denials for the purpose of resubmitting requests for release and challenging the lawfulness of the denials.

## FIFTH CLAIM FOR RELIEF

(Violation of the Administrative Procedures Act, 5 U.S.C. § 553)

81. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

82. In the alternative, Petitioners are in violation of the Administrative Procedures Act, 5 U.S.C. § 553, in that their new policy of denying release to Haitians constitutes a substantive rule which has not been adopted in conformity with the notice, publication and comment provisions of 5 U.S.C. § 553, *et seq*.

83. As a result of Respondents' violation of 5 U.S.C. § 553, the Petitioners and class members unlawfully detained without a determination of the propriety of release in accordance with the law.

## SIXTH CLAIM FOR RELIEF

(Violation of the Administrative Procedures Act, 5 U.S.C. § 701 et seq.)

84. Petitioners, on behalf of themselves and all persons similarly situated, reallege and incorporate by reference paragraphs 1 through 68 inclusive.

85. Respondents are in violation of the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, in that they have unlawfully withheld agency action to which the Petitioner class is entitled and have not acted in accordance with law by maintaining the policies and practices as set forth herein which are in violation of 8 U.S.C. § 1225(d)(5)(A) and 8 C.F.R. § 212.5, the fifth amendment to the United States Constitution, and 5 U.S.C. § 555(e).

86. As a result of Respondents' violation of 5 U.S.C. § 701, *et seq.*, Petitioners and class members have been unlawfully unlawfully [sic] detained without a determination of the propriety of release in accordance with the law.

## REQUEST FOR RELIEF

WHEREFORE, Petitioners request that this Court:

1. Accept jurisdiction and maintain continuing jurisdiction of this action.

2. Certify this action as a class action.

3. Issue a class writ of habeas corpus and preliminary and permanent injunction directing Respondents to:

(a) immediately release Petitioners and class members who are being held unlawfully on account of their nationality and/or race;

(b) cease using race and nationality as a factor in adjudicating requests filed by Haitian asylum seekers who have passed their credible fear interviews or who are otherwise eligible to be considered for release;

(c) evaluate all pending and future requests for release on a case-by-case basis in accordance with 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the equal protection and due process protections guaranteed by the fifth amendment to the United States Constitution;

(d) reevaluate all denied requests for release filed by Haitian asylum seekers since December 3, 2001 in accordance with 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5, and the equal protection and due process protections guaranteed by the fifth amendment to the United States Constitution; and

(e) provide accurate notice of the reasons for the denial of a release request; and

(f) complete (a) through (e) within ten (10) days.

4. Grant such other relief that this Court may deem just and proper.

Dated: _____

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By: _____
REBECCA SHARPLESS

**Declaration of Clarel Cyriaque**

1. My name is Clarel Cyriaque. I am a licensed attorney and have been a member of the Florida Bar since 1995. My business address is 155 S. Miami Avenue, PH1E, Miami, FL33130. I have practiced in the field of immigration law since becoming a licensed attorney.

2. In the past year, I represented approximately 75 detained Haitian asylum seekers in Miami who arrived prior to December 2001 and passed through the credible fear process. All of these individuals were released from detention within days of their passing their credible fear interviews.

3. Since December 2001, I have represented several Haitian asylum seekers who have passed their credible fear interviews. None has been released. In January 2002, I spoke with Wesley Lee, Officer in Charge at Krome Service Processing Center, regarding the detained Haitian asylum seekers. He said that every request for parole was being considered on a case-by-case basis and that there had been no change in the parole policy for Haitians. He further stated that Haitians were not being singled out for detention. He suggested that I submit release requests for my clients and to let him know if the INS deportation officers in charge of the cases failed to adjudicate the requests.

4. I then submitted written release requests for my clients. On February 28, 2002, however, I spoke with a deportation officer about a Haitian case in which I had filed a request for release. The deportation officer told me that she could not release my client because she has received an order from her superiors in Washington to not release Haitians. I asked if there was anything I could do to reverse the decision to deny release to my client. She told me that there are no criteria in

place right now that the Haitians can meet in order to be released. Based on this information, I believe that Wesley Lee's prior statements to me indicating that Haitians were considered for release on a case-by-case basis were misleading, if not false.

5. On March 9, 2002, I attended a meeting between INS officials, Congressman Conyers, and advocates at Krome. At this meeting, Acting District Director John Bulger said that there is a policy of not releasing Haitians to deter additional Haitians from coming to the United States. I expressed my concern during this meeting that the INS had been giving advocates like myself incorrect and misleading information about whether Haitians were being considered for release from detention. I said that attorneys like myself had been running around filing release requests for their clients based on INS's prior representation that Haitians were being considered for release on a case-by-case basis. We had wasted a lot of valuable time working on these release requests; time that could have been spent preparing asylum claims.

6. By virtue of being detained, the Haitians are scheduled for their hearings much more quickly than they would be if they had been released. Released asylum seekers typically have about a year to prepare their cases before having a final merits hearing. In contrast, detained asylum seekers have their final hearings within months of their arrival. Additional immigration judges have been detailed to Krome to handle the Haitian cases on special court dockets created solely for the Haitians. Judges are scheduling up to five court hearings a day on this docket to hear the Haitians' asylum cases. To my knowledge, the court currently has no other separate court docket for any other nationality.

7. In my experience, individuals who are released from INS custody sometimes do not appear in the court system for several months or longer. This is due to either INS delay in filing the charging document with the court or the court's delay in processing the charging document. In contrast, detained individuals subject to removal proceedings are typically scheduled for hearings within a week or two. Based on the above, it is my opinion that people who have passed their credible fear interviews but who do not appear in the court system within a month after their interview have been released.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

_____

CLAREL CYRIAQUE DATE

## DECLARATION OF CHERYL LITTLE

I, Cheryl Little, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and recollection.

1. I am the Executive Director of the Florida Immigrant Advocacy Center (FIAC). The Florida Immigrant Advocacy Center is a non-profit organization which provides free legal services to detained as well as non-detained immigrants in removal proceedings.

2. In early December 2001, FIAC became aware that a large boatload of Haitian asylum seekers had arrived in Miami and that most of them were placed in the credible fear asylum process. Prior to December 2001, asylum seekers who passed their credible fear Asylum Office interviews were considered for release on a case-by-case basis and were routinely released from detention within a few days after passing their interview. For example, virtually all Haitians who arrived in November 2001 and passed their credible fear interviews were released on parole shortly after they arrived.

3. FIAC had no reason to believe that the Haitians who arrived in December would be treated any differently. Only in early January, 2002 did we realize that the INS may not be releasing Haitian asylum seekers who had passed their credible fear interviews as they had in the past, although INS officially were [sic] saying there was no change in INS policy vis-a-vis the Haitians. We immediately started meeting with these Haitians, conducting know-your-rights presentations, and distributing our screening questionnaire. We also opened files on all those Haitian asylum seekers who filled out and returned our screening questionnaire. In January alone, we received 162 written requests for assistance. In an attempt to get the Haitians released,

we also assisted 186 of them with *pro se* written requests for parole. FIAC staff spent many hours calling family members and other sponsors to verify accurate address information for the release requests.

4. Of the 186 release requests filed by Haitian asylum seekers with the assistance of my staff, 90 people received denials. To my staff's knowledge, the remainder did not receive a response. None of these Haitians has been released. Each of the 90 denials was issued on the same form letter; and each decision contained virtually identical reasons for denial. Denials filed on March 4, 2002 were denied the following day. The majority of the decisions state that the Haitian applicant failed to establish that he or she would likely appear for a hearing 1) because he or she failed to sufficiently establish identity and 2) "based on particular facts of [his or her] case." A minority of the decisions state only the second reason. None of the denials mentions a policy of the INS to detain Haitian asylum seekers. Moreover, the claim that the Haitians have not sufficiently proven their identity is baseless. The Haitians who arrived on or after December 3, 2001 have the same level of proof of identity as the Haitians who arrived before that date and non-Haitians who continue to be routinely released.

5. On January 17 or the 18th, 2002, FIAC spoke with Mr. Steven Lang, *Pro Bono* Coordinator for the immigration court, to discuss our concern about the lack of legal representation for the Haitians. We subsequently wrote a letter to Mr. Lang, Gail Padget of the Office of the Chief Immigration Judge, and George Spreyne, Executive Office of Immigration Review (EOIR) Court Administrator. We wrote about our concerns regarding the expedited nature of the asylum proceedings and the fact that all but a handful of the Haitian asylum seekers were being forced to proceed with their cases without the benefit of legal

counsel. We proposed to spearhead a coordinated effort with a coalition of non-profit legal service providers to assist the asylum seekers in completing their asylum applications by organizing clinics at Krome and TGK. We also indicated that in order to assist the large number of detainees we would need a continuance of seven weeks. We then spoke with Ms. Padget, who indicated that the granting of a continuance is solely within the discretion of the immigration judge sitting on the case.

6. On January 28, 2002, members of FIAC, Catholic Charities, and the Haitian Lawyers Association met with Judge Ford–who was the judge detailed to Krome to handle the special Haitian docket–and Mr. Rene Mateo, Deputy INS District Counsel, regarding our proposal to help the asylum seekers fill out their asylum applications. Judge Ford denied our request for continuances of the call-up dates for the filing of asylum applications. However, he indicated that he would, in his discretion, refer any Haitian asylum applicant who tendered an incomplete application, or who failed to complete an application for asylum, to a free legal service provider, including FIAC. We provided Judge Ford with a list of free legal service organizations with their contact information.

7. From public information available from the immigration court, we learned that Judge Ford granted continuances to approximately 14 individuals, even though over a hundred Haitian asylum seekers appeared before him during the week of January 28th. For the remainder, he accepted the asylum application and set a date for an asylum merits hearing 2 to 6 weeks into the future. From a review of most of the asylum applications filed, we learned that the asylum applications were, in fact, not "complete" and did not contain all of the reasons the applicants feared return to Haiti. In many cases, the applications contained

only one or two sentences. In speaking with the applicants, it became clear to my staff that the Haitian asylum seekers either did not understand that the applications needed to be detailed or they did not have the means of completing a detailed application. My staff also witnessed one officer with no training in asylum law help a detainee fill out an asylum application. My staff is aware of fifty Haitian asylum seekers who have already been ordered deported by an immigration judge. Some of these Haitians had their asylum applications deemed abandoned and were ordered removed from the United States because they couldn't find lawyers and were unable to fill out their asylum applications. Many other Haitian asylum seekers are scheduled for merits hearings in the coming days and weeks.

8. At least three additional judges have been detailed from their downtown courtrooms to Krome to quickly hear the Haitian cases. The immigration court has instituted a special court docket for the detained Haitian asylum seekers. I am not aware of any other current example of the court setting up a docket for a particular nationality. In the 1980's, however, Haitians were scheduled for court hearings on a special docket as part of a special "Haitian Program" aimed at depriving Haitian asylum seekers of their due process rights.

9. Individual judges are holding up to five merits hearings a day on the special Haitian docket. Moreover, there are special restrictions on the Haitian cases that do not apply to cases on the regular court docket. One of my staff members entered his appearance and made a motion for a continuance. The judge informed him that it was not possible to grant a continuance of more than four weeks because "there is no docket" and that he was being detailed to Krome for a "limited period of time." There are no such limitations on the regular court docket. The judge also scheduled two

cases in which one of my staff, who had already entered his appearance in these cases, was forced to go forward with merits hearings at 9:00 and 10:00 am on the same day. When my staff member objected and asked for more time for the hearings, the judge refused to reschedule the hearings (see attached FIAC letter to Gail Padget, Assistant Chief Immigration Judge, March 13, 2002). Indeed, the court calendar for many of the Haitian cases reflects only half hour hearings.

10. There are numerous barriers to assisting the Haitians by virtue of their being in detention. The detainees are spread between three different locations, Krome, TGK, and a local hotel, making it difficult for FIAC staff to gain access to see the detainees. Virtually all speak only Creole. As a result, many of my staff and law student volunteers must work through interpreters, which slows down the case preparation process. Typically in Haitian asylum cases, my office staff spend 15 - 50 hours preparing for one asylum merits hearing. Moreover, there is not sufficient attorney visitation space for FIAC's staff at either Krome or TGK to enable my staff to meet privately with more than one or two detainees at a time. On March 11, 2002, a FIAC staff attorney asked Wesley Lee, Officer in Charge at Krome, for space to meet with his client because all of the attorney visitation booths were full. Officer Lee informed him that there was no additional space that he could use to meet with his client.

11. Recent efforts by the EOIR Pro Bono Coordinator to obtain pro bono attorneys for the Haitians have not been successful. The President of South Florida Chapter of the American Immigration Lawyers Association (AILA) informed the EOIR that their resources are already "stretched to the limit" (see attached letter from EOIR Pro Bono Coordinator and response from AILA South Florida Chapter President).

12. FIAC is committed to trying to represent any Haitian asylum seeker who requests our help. Currently, there are at least a hundred detained Haitian asylum seekers in need of representation. However, given the current timeline of these cases, we are not in a position to help everyone who needs assistance.

13. Over the last two months, I have received conflicting and misleading information from INS officials regarding the detention of Haitians.

14. On January 29, 2002 a small group of Miami-Dade County's Community Relations Board members and I met with INS Miami District Chief of Staff, John Shewairy, to discuss the plight of the Haitians detained in Miami.

15. We expressed our grave concern that since December, 2001, Haitian asylum seekers who passed their credible fear interviews with Asylum Officers were not being released. We said this appeared to be a racist policy, and INS was once again singling out Haitians for special discriminatory treatment because other groups of similarly situated asylum seekers were being released.

16. Mr. Shewairy said there was no policy to deny Haitian asylum seekers in the Miami District release from detention. He said it takes time to release persons when you have such a large number of detainees and that it does INS no good to keep persons in detention when they don't need to. He said INS also was concerned that the Haitians didn't have lawyers. He said Miami INS officials were "not there yet" in terms of releasing the Haitians and if and when INS decides to release them, they will do so in a very set manner. He also said he believed some Haitians had been released since December 2001 and reiterated that INS had no policy of refusing to release the Haitians.

17. On March 9, 2002, I attended a meeting at Krome with Congressman Conyers, advocates for the Haitians, and INS officials, including Acting Miami District Director John Bulger. At this meeting, John Bulger stated that there is indeed a policy of not releasing Haitians. He said that he made the initial decision not to release the Haitians and that subsequent decisions "to keep all the Haitians in custody" was made by INS Headquarters. He also said that the boatload of 166 Haitians which arrived on December 3, 2001 presented a "very dangerous set of circumstances" for the Haitians and that the issue of a mass influx of Haitians "is the business of INS." He added that INS doesn't want to do anything to send a signal to Haitians that they should embark on a dangerous journey.

18. On March 9, 2002 Congressman Conyers, myself and some other Haitian advocates toured Krome, TGK and the local motel housing Haitians. During our tour of these facilities we met with many of the Haitian asylum seekers. Most were anxious and extremely depressed, and conditions of their confinement were particularly troubling. Krome, for example, is very overcrowded. According to Wesley Lee, Krome's Officer-in Charge, the population at Krome on March 9, 2002 was 680 even though the maximum capacity should be 538. I saw a number of cots in the men's dorm we visited. Conditions at TGK, where most of the Haitian women are being held, are even worse. TGK is a maximum security county jail which has housed the female INS detainees since December 2000, following allegations of sexual abuse of the women by officers at Krome. The Haitian asylum seekers housed at TGK, like the inmates, are subjected to arbitrary and frequent lockdowns, hourly counts during the night, which prevents them from sleeping, and invasive strip searches. Many of the

detainees at TGK claim they are not receiving adequate medical care. For example, on March 8, 2002 one of FIAC's clients was spitting up blood in the presence of a TGK officer. Despite FIAC's and the Officer's calls to the health clinic at TGK and the woman's own desperate plea for help, our client did not receive appropriate medical attention until the following day when Congressman Conyers insisted that she be seen by a doctor. She had to be taken to the hospital that same day. The Haitian women also have little or no access to spiritual support, an adequate law library or recreational activities. These problems are exacerbated by the lack of translation and/or interpretation services at TGK. Most of the Haitian women do not speak any English and therefore frequently cannot communicate their needs. These language difficulties have routinely led to some officers misunderstanding, berating, and humiliating them (see attached statement of Roseline Legrand).

19. Those Haitian families housed in a local motel are also subject to great mental stress. I saw a family of five in one room, which included a seventy-nine year old Haitian woman and a nineteen month old baby. Another Haitian family at the motel consisted of a number of children and their father. Even though the children had been living with their mother in Haiti, not the father, their mother is being detained at TGK. While those in the motel appear to be somewhat better off than those at Krome or TGK, they are clearly in a gilded cage. They are provided no recreation and are confined to their rooms. INS guards are posted outside their rooms. The children there are receiving no education whatsoever.

20. Conditions at Krome, TGK and the motel are such that many of the Haitians said they felt they were being pressured to abandon their asylum claims.

Date

Cheryl Little, Esq.
Executive Director
Florida Immigrant Advocacy
Center, Inc.

## DECLARATION OF EVENETTE MONDESIR

I hereby state the following under penalty of perjury:

1. My name is Evenette Mondesir. I am an attorney licensed in Florida who has practiced immigration law since 1990. My business address is 209 N.E. 95th Street, Suite 1, Miami, Florida 33138.

2. Since the credible fear asylum process was instituted in 1997, I have represented hundreds of Haitian asylum seekers in that process. Initially, it was difficult for them to get released from detention if they passed their credible fear interview. In the last several years, however, it became routine for most asylum seekers of all nationalities to be released upon establishing a credible fear of persecution.

3. Prior to December 2001, all of my Haitian clients were released from detention if they passed their credible fear interview. Typically, they were released within days of their interviews.

4. Suddenly in December 2001, INS started keeping all of my Haitian clients in detention, including my Haitian clients who are lawful permanent residents. I first learned that Haitians were being treated differently when I filed a written release request for a Haitian client who is a lawful permanent resident with one conviction. After I filed the request for his release, the deportation officer told me to obtain some additional documents to supplement the request. I did so. When I returned with the documents, he told me that Haitians were not being released based on orders from Washington. After a few days, I got a written denial of the release request. The denial did not state that the release was denied due to orders from Washington.

5. I filed about 14 other written release requests for Haitian asylum seekers. I only got two responses. They were both denials. Neither of the denials stated that my clients were being denied release based on a policy of keeping Haitians in detention. Rather, the denials stated that my clients were being denied based on a failure to sufficiently establish their identity and other unspecified facts in their cases. Relatives of my clients spent a lot of money trying to get my clients' identity documents from Haiti.

6. I then met with Wesley Lee, Officer in Charge at Krome Service Processing Center, about the treatment of Haitians. He denied that there was a policy of keeping Haitians in detention. He encouraged me to keep filing release requests for my clients and that they would be considered based on the individual facts of each case. He asked me to give him copies of the release requests I had already filed and that he would look into the status of the release requests. I gave him the copies of what I had submitted. I never [sic] any response on those release requests from Officer Lee or any other INS officer.

7. I then went to a meeting of leaders in the Haitian-American community and the INS Miami District Director, John Bulger, and Chief of Staff, John Schewary. We were told that there was no policy of detaining Haitians and that Haitians would be released on a case by case basis. They also told us that they were investigating the deaths that occurred on the December 2, 2001 boat carrying a large number of Haitians. I pointed out to Mr. Bulger and Mr. Schewary that all Haitians were being detained, not only the ones that arrived on that boat. Mr. Schewary advised me to send him a list of the Haitian detainees I was trying to help and he said he would look into it. After

this meeting, I wrote a letter to the District Director and others on behalf of one of my clients. This letter asks for my client's release and also explains the conflicting information I had been receiving about the treatment of Haitians. I never got a response from this letter.

8. Despite INS's statements to the contrary, I realized that my Haitian clients were not going to be released. I, along with other private attorneys and nonprofit agencies, started to help the Haitians with their asylum cases. We were all extremely concerned that the Haitians were not properly completing their asylum applications because they did not speak English and had no help. We were also concerned that the Haitians were placed on a single court docket. To my knowledge, the immigration court has never made a special docket just for people of a certain nationality.

9. In January 2002, I attended a meeting with a group of nonprofit agencies and the immigration judge who was hearing the cases on the Haitian docket. We asked him to continue the cases of pro se Haitian asylum seekers so that we could help them complete their asylum applications and try to find them pro bono attorneys. The judge denied our request. I filed my notice of appearance in about 10 cases and was granted continuances. However, there are over two hundred Haitian asylum seekers in detention and the vast majority do not have attorneys.

10. It is extremely difficult to represent the detained Haitians. At the Krome Service Processing Center, there are only three attorney booths available for use by private attorneys. Only two of the three booths permit contact between the attorney and client. I often have to wait a long time for an attorney booth. Also, there are often

delays in getting detainees brought to the attorney visitation area. It is not unusual for me to wait two hours to speak to a client, due to this delay and the lack of attorney visitation space.

11. I also represent some Haitian women detained at the Turner Guilford Knight Correctional Center in Miami. On March 7, 2002, I spoke with the INS deportation officer in charge of the women's cases. She told me that she had the parole requests that I had filed with my clients. She said that I could file new requests, but that she would not be able to do anything with them because INS is not releasing Haitians.

12. On Saturday, March 9, 2002, I attended a meeting between INS officials, Congressman Conyers, and advocates at Krome. At the end of this meeting, John Bulger said that there is a policy of not releasing Haitians to deter additional Haitians from coming to the United States.

13. INS has been misleading the Haitian community leaders and attorneys for almost four months about the treatment of Haitians. As stated above, I was given conflicting information about how Haitian cases were being handled. Other advocates and myself spent numerous hours preparing release requests and advocating for our clients' release. Relatives and families spent money trying to get identity documents from Haiti. INS knew that our efforts would be futile given the policy of not releasing Haitians. The time I spent on trying to get the Haitians released could have been used on preparing their asylum applications.

14. Based on INS's previous statements, community leaders like Joseph Celestin, the Mayor of North Miami,

had been telling the community that it was possible to get Haitians released. These leaders encouraged people to make release requests.

15. I believe that INS is not treating Haitians fairly and, for months, was trying to cover up its policy of keeping Haitians in detention.

EVENETTE MONDESIR DATE

## DECLARATION OF CHARLOTTE NEWHOUSE AL-SAHLI

I, Charlotte Newhouse al-Sahli, state the following under penalty of perjury:

1. My name is Charlotte Newhouse al-Sahli. I was born on September 2, 1976. I am the Detention Advocacy Coordinator for the Florida In migrant Advocacy Center, Inc. (the Center).

2. As part of my work at the Center, I compiled the custody status data for all Haitian asylum seekers in the credible fear asylum process who passed their credible fear interviews between November 1, 2001 and February 15, 2002. I also determined the current population of all Haitian asylum seekers who have passed their credible fear interviews and who are detained in South Florida as of March 12, 2002. This declaration contains a summary of my findings as well as a statement of the methodology I used.

### SUMMARY OF FINDINGS

3. By the methodology described starting in paragraph 8, I determined that there were 26 Haitian asylum seekers who had their credible fear interviews November 2001 and passed their interviews. Only one remains in detention; the other 25 were released. The one individual who remains in detention passed his credible fear interview on November 30, 2001.

4. The release rate for all Haitians who arrived in November 2001 and who passed credible fear is therefore 96 percent.

5. I determined that only 3 Haitian asylum seekers of the total of 160 who had their credible fear interviews between December 1, 2001 and February 15, 2002 were released. By calling the attorneys for these individuals, I learned that two of the three are pregnant women. The third individual passed his credible fear interview on December 3, 2001.

6. I further determined the following release rates for non-Haitians who passed their credible fear interviews: 89% in November 2001, 95% in December 2001, 95% in January 2002, and 84% from February 1-15, 2002. The average release rate of these non-Haitians from December 1, 2001 to February 15, 2002 is 91%.

7. I also estimated the current population of Haitian asylum seekers in the credible fear process who are detained in South Florida. I estimate this population to be over 240 detainees.

## METHODOLOGY

8. The first step I took in compiling the data was to obtain the daily lists generated by the INS Asylum Office of every asylum seeker in the credible fear process in South Florida. These lists contain the names, alien registration numbers (a unique INS identifier), and nationality of everyone who enters the credible fear asylum process in South Florida. I gathered the lists for November 2001, December 2001, January 2002, and the first half of February 2002. I was unable to obtain the daily lists for December 3rd and 10th, 2001 and January 4th and 9th, 2002. The data I compiled may not include some individuals that were listed on those four dates.

9. I am aware that the daily lists generated by the INS Asylum Office do not reflect all of the Haitian asylum seekers in the credible fear process who arrived in December 2001. I know this because staff at the Center have had personal interviews with 52 detained Haitian asylum seekers who passed their credible fear interviews but who do not appear on the INS Asylum Office lists. In order to be as conservative as possible in compiling the custody status data, I excluded these individuals and only counted individuals who appeared on the INS Asylum Office lists. However, these 52 individuals are included in the total estimated population of Haitian asylum seekers who passed their credible fear interviews and are detained in South Florida.

10. I then made a spreadsheet with information regarding every individual who appeared on the credible fear lists between November 1, 2001 and February 15, 2002. I ensured that no individual was listed more than once by checking for duplicates.

11. I then eliminated from the spreadsheet individuals who had not passed their credible fear interviews, as these individuals are not eligible to be released from detention. I did this by calling the Immigration Court Information System ("Court System"). By this process, I identified a total of 808 asylum seekers who had arrived between November 1, 2001 and February 15, 2002 and who had passed their credible fear interviews.

12. I then determined the custody status of each individual. I did this by having staff members at the Center call the Court System to determine whether the individual was in immigration proceedings at a detention site. If the person was in proceedings at a detention center,

I concluded that the person was detained. If the person was in proceedings at a site other than a detention center, I concluded that the person had been released.

13. A total of 198 individuals were not in the Court System. I eliminated these individuals from the spreadsheet and therefore these individuals are not included in my final data. Only seven of the individuals on this list are Haitians and these seven all received their Credible Fear Interviews in November 2001. It is extremely likely that the vast majority of individuals in this group of non-Haitians and Haitians not in the Court System have been released. They do not appear on the February 12, 2002 custody list maintained by INS that includes people in detention in South Florida. Moreover, it is the experience of the Center's staff that there is sometimes a significant lag time between the date that a person is released from detention and the date that the person enters the Court System. In contrast, the cases of detained individuals typically appear in the Court System in an expedited manner. The fact that a particular person is not in the Court System therefore indicates that the person has been released. To use the most conservative means possible to determine whether or not someone was released, however, I made no assumptions about the custody status of any individual who was not in the Court System. Rather, I eliminated these individuals from the main spreadsheet. These individuals are therefore not listed on my main spreadsheet but are listed on Spreadsheet B attached to this declaration. If I had included these individuals as released, the statistics would have demonstrated an even greater difference in the treatment of Haitians and non-Haitians.

14. Attached to this declaration are charts summarizing my release data as well as my spreadsheet containing information on the 559 individuals included in my calculations (Spreadsheet A). Also attached is the list of 198 individuals not in the Court System discussed above in paragraph 8 (Spreadsheet B). Although the custody status data which formed the basis of our statistics is limited to the period of November 1, 2001 through February 15, 2002, I continued to identify Haitian asylum seekers who passed their credible fear interviews on and after February 16, 2002. Between February 16, 2002 and March 12, 2002, there were at least 35 additional Haitians who passed their credible fear interviews and were detained in South Florida. These individuals are included in the estimated detained population of Haitian asylum seekers.

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

_____

CHARLOTTE NEWHOUSE AL-SAHLI DATE

Supreme Court, U.S.
FILED
OCT 14 2003
OFFICE OF THE CLERK

No. 03-230

# In the Supreme Court of the United States

ERNEST MOISE, ET AL., PETITIONERS

*v.*

JOHN M. BULGER, INTERIM DISTRICT DIRECTOR, FLORIDA, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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19 pp

## QUESTIONS PRESENTED

1. Whether the Acting Deputy Commissioner of the Immigration and Naturalization Service validly exercised his delegated authority in adjusting agency policy concerning the detention of certain inadmissible Haitian aliens arriving in South Florida.

2. Whether the district court abused its discretion in dismissing petitioners' claims without further evidentiary proceedings.

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# In the Supreme Court of the United States

No. 03-230

ERNEST MOISE, ET AL., PETITIONERS

*v.*

JOHN M. BULGER, INTERIM DISTRICT DIRECTOR, FLORIDA, BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-3) is reported at 321 F.3d 1336. The opinion of the district court (Pet. App. 4-40) is reported at 204 F. Supp. 2d 1366.

### JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. A petition for rehearing was denied on May 13, 2003 (Pet. App. 41-42; Pet. 1). The petition for a writ of certiorari was filed on August 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The immigration laws provide that when an immigration official determines that an alien arriving at the border is inadmissible to the United States for lack of valid entry documents, the official "shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [8 U.S.C. 1158] or a fear of persecution," in which case the alien must be referred for an interview with an asylum officer. 8 U.S.C. 1225(b)(1)(A)(i). Aliens who establish at the time of their asylum interview that they have a "credible fear of persecution" if returned to their home country—*i.e.*, "that there is a significant possibility * * * that the alien could establish eligibility for asylum" in further proceedings—"shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii) and (v).[1]

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[1] On March 1, 2003, certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service (INS), including the initial adjudication of asylum and refugee applications, were transferred to the Department of Homeland Security and assigned to its Bureau of Citizenship and Immigration Services (CIS). See Homeland Security Act of 2002, Pub. L. No. 107-296, § 451(b), 116 Stat. 2196 (to be codified at 6 U.S.C. 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830 (2003) (to be codified at 8 C.F.R. Ch. V (Pts. 1001-1337)) (Justice Department implementing regulations as recodified after Homeland Security Act). Before the reorganization and termination of the INS, the INS and its officials were named as the lead respondents in this case. As explained below, none of the petitioners is presently in custody in the United States. Accordingly, there is no proper habeas corpus respondent who can

The release of those so-called "credible fear" aliens from their statutorily mandated detention is governed by the general immigration parole statute, 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) provides that the Attorney General, "in his discretion," may parole temporarily into the United States any alien applying for admission "under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A). Administrative regulations provide that, when the requirement of urgent humanitarian reasons or a significant public benefit is satisfied, parole may be granted if "the aliens present neither a security risk nor a risk of absconding." 8 C.F.R. 212.5(b).

At the time of the relevant events in this case, the Attorney General had delegated his parole authority to the Commissioner of the INS. See 8 U.S.C. 1103(a) (2000); 8 C.F.R. 2.1 (2001). INS regulations stated, in turn, that

> [t]he authority of the Commissioner to continue an alien in custody or grant parole under [8 U.S.C. 1182(d)(5)(A)] shall be exercised by the district director [of the INS] or chief patrol agent, subject to the parole and detention authority of the Commissioner or her designees, which include the Deputy Commissioner, the Executive Associate Commissioner for Field Operations, and the regional director, any of whom in the exercise of discretion may invoke this authority under section [1182(d)(5)(A)].

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be substituted at this time, see 28 U.S.C. 2241(c), 2243, and we have accepted for purposes of this case petitioners' substitution of a CIS official as the lead respondent. See Pet. ii n.i.

8 C.F.R. 212.5(a) (as added by *Clarification of Parole Authority*, 65 Fed. Reg. 82,256 (2000)).

Parole determinations also were guided by INS's Detention Use Policy, which prioritized the use of the agency's limited detention space. See Pet. App. 26. That document established a general policy favoring the release of aliens who had established a credible fear of persecution in their home country, although parole of such aliens was discretionary in all cases and the Detention Use Policy contained an exception for "credible fear" aliens who posed a risk of flight or danger to the community. *Ibid.*

2. On December 3, 2001, the Coast Guard rescued 167 Haitian aliens from their "rickety and overloaded" boat, the Simapvivetzi, off the coast of South Florida. Eighteen other passengers of the Simapvivetzi swam to shore in Florida. Two persons on the boat apparently drowned. See Pet. App. 7.

None of the 167 persons rescued from the Simapvivetzi had valid documents for entering the United States. Accordingly, immigration officials determined that they were inadmissible to this country and placed them in expedited removal proceedings under 8 U.S.C. 1225(b)(1)(A). Pet. App. 7. When the INS conducted asylum interviews of those aliens in accordance with Section 1225(b)(1)(B), it determined that 165 of them had a credible fear of persecution. Those "credible fear" aliens were given an opportunity to seek asylum at a hearing before an immigration judge. Pet. App. 7-8 & n.3.

3. Concerned about an observed increase in life-threatening ocean crossings by Haitian migrants bound for the United States, and seeking to reduce the incentive to attempt such crossings, the Acting Deputy Commissioner of the INS instructed the agency's Miami

District office in mid-December 2001 that no undocumented arriving Haitians should be paroled without the approval of INS Headquarters. Pet. App. 8. The INS continued, however, to review parole requests by undocumented Haitian migrants on a case-by-case basis. Some applicants received parole. In March and April, 2002, the INS adopted exceptions to its Headquarters-approval policy to address the situations of successful Haitian asylum applicants and Haitians arriving by air or other regular means at designated ports of entry in South Florida. See *id.* at 8-9.

4. a. Petitioners are six Haitian nationals who were rescued from the Simapvivetzi, established a credible fear of persecution in their asylum interviews, and were allowed to present their asylum claims to immigration judges. Initially, the INS detained each of the petitioners during their immigration proceedings. See Pet. App. 9-10 & n.4.

On March 15, 2002, petitioners filed a habeas corpus petition in the United States District Court for the Southern District of Florida on behalf of a putative class of detained "credible fear" aliens from Haiti who arrived at the border on or after December 3, 2001. Petitioners also filed a complaint for declaratory and injunctive relief on behalf of the putative class. Pet. App. 10; Pet. 9-10. Petitioners alleged that the INS's application of the December 2001 policy adjustment violated the Due Process Clause of the Fifth Amendment, the immigration laws and INS's implementing regulations, the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985). Petitioners asked the district court to order their release on parole on an emergency basis and to enter an injunction concerning

the INS's future processing of parole requests by members of the putative class. See Pet. 9-10.

On May 10, 2002, the district court dismissed two of the six named petitioners from the case because they had been paroled by the INS. Petitioners agreed that the grants of parole mooted the claims of those petitioners. Pet. App. 9 n.4.

b. By May 17, 2002, briefing on petitioners' emergency motion and the motion for class certification had been completed, both sides had provided additional information requested by the district court, and the court had received unsolicited supplemental pleadings. See Pet. App. 10-11. On that date, the district court denied petitioners' pending motions and dismissed the habeas corpus petition and complaint. *Id.* at 4-40.

The district court first addressed the significance of 8 U.S.C. 1252(a)(2)(B)(ii), which provides in pertinent part that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any * * * decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). The court concluded that Section 1252(a)(2)(B)(ii) denied it jurisdiction over challenges to discretionary parole decisions in particular cases, but allowed the court to exercise habeas corpus jurisdiction over petitioners' challenge to the INS's "statutory and constitutional authority to refuse them parole allegedly without making case-by-case determinations." Pet. App. 19; see *id.* at 18-20, 36-37.

Turning to the merits of that challenge, the district court rejected petitioners' due process claim because, as aliens stopped at the border and denied admission to the United States, petitioners lack any constitutionally protected right to parole and must instead rely on "the

statutory rights and privileges granted by Congress." Pet. App. 22; see generally *Zadvydas* v. *Davis*, 533 U.S. 678, 692-693 (2001); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210, 214-215 (1953).

Next addressing petitioners' statutory claims, the court disagreed with their view that, under this Court's decision in *Jean*, "the Executive must maintain nationality-neutral parole criteria as a policy matter." Pet. App. 30. The court determined, instead, that the Acting Deputy Commissioner of the INS possessed the necessary delegated authority to adjust the INS's parole criteria in South Florida, see *id.* at 31-32, and that his concerns for "preventing loss of life and avoiding a mass migration from Haiti are facially legitimate and bona fide reasons" that adequately supported the December 2001 policy change. *Id.* at 35; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) (when Executive Branch denies admission to excludable aliens "on the basis of a facially legitimate and bona fide reason, the courts will n[ot] look behind the exercise of that discretion"). The district court also observed that the "demonstrated desperation" of aliens who leave Haiti by boat supported the INS's determination that such aliens were particularly unlikely to appear for their immigration proceedings if granted parole. Pet. App. 36.

The district court further determined that the December 2001 parole policy adjustment is a general statement of policy that is exempt under 5 U.S.C. 553(b) from the APA's procedural requirements for agency rulemakings. Pet. App. 38-39. The court noted that the December 2001 policy adjustment "d[id] not establish a binding norm" for parole determinations, but rather allowed INS officials to grant parole to Haitians covered by the new policy based on individualized

consideration of their particular parole applications. *Id.* at 38.

5. Petitioners appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. While the appeal was pending, three of the four remaining petitioners withdrew their requests for relief from removal to Haiti and voluntarily accepted removal from the United States. See Gov't Mot. to Dismiss Prospere and Notice of Intent to Remove Jeanty and Colas 2-3 (filed Nov. 19, 2002); Gov't Mot. to Dismiss Jeanty and Colas 2-4 (filed Dec. 23, 2002). The court of appeals dismissed those petitioners from the detention appeal, leaving petitioner Laurence St. Pierre as the only named petitioner still in the case. See Pet. App. 2.

On February 10, 2003, St. Pierre was removed to Haiti after the Board of Immigration Appeals upheld the removal order of an immigration judge and St. Pierre failed to seek judicial review of that decision.

On February 20, 2003, the court of appeals affirmed the district court's decision for the reasons stated by the district court. Pet. App. 3. Petitioners sought panel rehearing and rehearing en banc. The court of appeals denied the petition for panel rehearing. No judge voted for to rehear the case en banc. See *id.* at 41-42.

## ARGUMENT

This case concerns the application of an obsolete detention policy to Haitian aliens who are no longer in the United States. The petition does not present any live dispute. Furthermore, the decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. This case is moot. All of the named petitioners have been removed from the United States and none is presently affected, or foreseeably will be affected, by the immigration authorities' rules for detaining arriving aliens who lack proper documentation. In this Court, moreover, petitioners neither contest the district court's failure to certify the case as a class action nor identify any putative class member, other than the named petitioners who have been removed to Haiti, who seeks to maintain this action. See generally *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 401-407 (1980) (discussing application of mootness principles in class action context).[2]

As an additional consideration weighing against review, the challenged INS policy adjustment that became effective in December 2001 has been superseded. On November 13, 2002, the INS published in the Federal Register a new policy—effective on that date—under which all non-Cuban aliens who arrive in the United States by sea, and who are inadmissible but establish a credible fear of persecution, "will be detained, with certain humanitarian exceptions, throughout those proceedings." *Notice Designating Aliens Subject to Expedited Removal Under Section*

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[2] Although the case is moot, the judgment below should not be vacated under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Petitioners do not seek that relief. In any event, the case became moot due to petitioners' own decisions. Of the four petitioners who were in the case when the district court entered its judgment, three voluntarily accepted their removal to Haiti. In declining to seek judicial review of her final administrative removal order, petitioner St. Pierre likewise "forfeited h[er] legal remedy" in the underlying immigration proceeding. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); see *Karcher* v. *May*, 484 U.S. 72, 83 (1987).

*235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68,924, 68,926 (2002). Petitioners' argument that the INS impermissibly singled-out Haitians for disfavored treatment under the December 2001 policy adjustment, see Pet. 15-22, therefore lacks ongoing significance.[3]

2. In addition to being moot and lacking ongoing significance, petitioners' legal arguments concerning their detention are without merit. First, there is no conflict between the court of appeals' decision in this case and *Jean* v. *Nelson*, 472 U.S. 846 (1985). In *Jean*, undocumented and unadmitted Haitians challenged the Attorney General's decision to depart from a general policy of parole for undocumented arriving aliens, and to adopt a policy of detention, without parole, for aliens who were not prima facie eligible for admission to the United States. The Haitians in *Jean* argued in part that the new policy violated equal protection principles because it discriminated based on race and national origin. See *id.* at 848-849. During the course of the litigation, the INS promulgated a new parole policy that, the parties agreed, "prohibit[ed] the consideration of race and national origin in the parole decision" concerning a particular alien. *Id.* at 851. This Court determined that the case before it could be resolved on the basis of the parties' agreement about the effect of the new parole regulations, and that there was no need to address the aliens' constitutional equal protection claim. *Id.* at 853-857.

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[3] As the November 13, 2002, *Notice* explained, "it is longstanding U.S. policy," reflected in provisions of the immigration laws themselves, "to treat Cubans differently from other aliens." 67 Fed. Reg. at 68,925.

As the district court correctly explained (Pet. App. 30), *Jean* does not support petitioners' position (Pet. 16-20) that the INS was barred in 2001 from adopting a new policy specifically to address the situation of Haitian migrants arriving in South Florida. To the contrary, it is well-accepted in the immigration area that policy adjustments may be implemented "to make a humane response to a natural catastrophe or an international political situation." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). In *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), this Court sustained such a policy specifically directed to deterring dangerous travel by sea and illegal immigration by Haitian migrants. See *id.* at 163-166, 187-188. Nor is there anything in the immigration laws that bars the responsible officials from exercising in a categorical manner their discretion whether to release an alien from detention. See *DeMore* v. *Hyung Joon Kim*, 123 S. Ct. 1708, 1718-1719 (2003) (discussing *Carlson* v. *Landon*, 342 U.S. 524 (1952), and *Reno* v. *Flores*, 507 U.S. 292 (1993)); see also *Lopez* v. *Davis*, 531 U.S. 230, 243-244 (2001).[4]

Second, the regulations governing parole were amended, effective in January 2001, specifically to

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[4] Nationality may be, and is, considered under the immigration laws even with respect to aliens who, unlike petitioners, have gained initial admission to the United States. For example, a permanent resident alien who is personally loyal to the United States nevertheless may be expelled if his nation becomes an enemy of the United States. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 587 (1952). And nationality is a permissible basis for drawing immigration-related distinctions among aliens who are lawfully in this country, so long as the distinctions are not wholly irrational. See *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding registration requirements for Iranian students), cert. denied, 446 U.S. 957 (1980).

delegate the Attorney General's parole authority to, *inter alia*, the Deputy Commissioner of the INS. See Pet. App. 25, 31. The policy at issue here was adopted by the Acting Deputy Commissioner. This therefore is not a situation, as in *Jean* v. *Nelson*, in which low-level INS personnel allegedly were making parole determinations in contravention of official INS policy. See 472 U.S. at 853-854. Petitioners' arguments about the authority of the Acting Deputy Commissioner of the INS to adopt a new parole policy for South Florida (Pet. 20-22) are incorrect in light of that official's delegated authority. See Pet. App. 31-32. The authority of particular INS officials, moreover, has no prospective importance after the dissolution of the INS earlier this year. See note 1, *supra*.

Third, and also contrary to petitioners' argument (Pet. 23-24), this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), does not suggest that the district court possessed jurisdiction to review the application of the December 2001 detention policy in particular cases. The district court concluded that it had habeas corpus jurisdiction under 28 U.S.C. 2241 to review "the Attorney General's statutory and constitutional authority to refuse [petitioners] parole allegedly without making case-by-case determinations." Pet. App. 19. The district court further concluded, however, that it lacked jurisdiction to undertake "full APA-style judicial review of the Attorney General's discretionary parole decisions." *Id.* at 20 n.9. Those determinations are fully consistent with *Zadvydas*, in which the Court similarly rejected the proposition that 8 U.S.C. 1252(a)(2)(B)(ii) precludes habeas jurisdiction over challenges to "the extent of the Attorney General's [statutory] authority," and concluded that "§ 2241 habeas corpus proceedings remain available as a forum *for statutory and consti-*

*tutional challenges*," as opposed to "review of the Attorney General's exercise of discretion." 533 U.S. at 688 (emphasis added).

3. Petitioners' contentions that the district court overlooked supposed issues of material fact (Pet. 25-27), impermissibly failed to hold an evidentiary hearing (Pet. 27-28), and abused its discretion in failing to permit petitioners to conduct discovery (Pet. 28), involve no unsettled questions of law. Those contentions also have no importance beyond this particular case, which is moot in any event.

For example, petitioners are incorrect when they rely (Pet. 27) on 28 U.S.C. 2243's requirement that a hearing date must be set when the writ or an order to show cause is returned by the habeas corpus respondent. In this case, the court never ordered respondents to answer the habeas petition. Instead, the court determined that briefing on petitioners' emergency motion for temporary or preliminary injunctive relief fully addressed the issues in the case. See Pet. App. 13 & n.7. Furthermore, Section 2243's requirement that "a day shall be set for hearing" does not mean that a hearing actually must be held. See *Stewart* v. *Overholser*, 186 F.2d 339, 345 (D.C. Cir. 1950). As for petitioners' argument concerning discovery, habeas corpus petitioners do not posses any general right to take discovery. Cf. Rules Governing Section 2254 Cases in the United States District Courts, Rule 6(a) (discovery allowed only if judge grants discretionary leave to undertake it, for good cause shown) (28 U.S.C. 2254 note). Finally, insofar as petitioners' arguments concern the exercise of general federal question jurisdiction and the Federal Rules of Civil Procedure (see Pet. 25-27), they ignore that habeas corpus is ordinarily the proper avenue for claims that a person is in custody in

violation of federal law. See, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 554 (1974).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2003

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No. 03-230

# In The Supreme Court of the United States

ERNEST MOISE, HEDWICHE JEANTY, BRUNOT COLAS, JUNIOR PROSPERE, PETERSON BELIZAIRE, and LAURENCE ST. PIERRE, on behalf of themselves and all others similarly situated,

*Petitioners,*

v.

JOHN M. BULGER, Interim District Director, Florida, Bureau of Citizenship and Immigration Services; THOMAS RIDGE, Secretary, Department of Homeland Security; JOHN ASHCROFT, Attorney General of the United States; DEPARTMENT OF HOMELAND SECURITY; BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY TO THE RESPONDENTS' BRIEF IN OPPOSITION

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## ARGUMENT

### I. THIS CASE IS NOT MOOT.

#### A. Named Plaintiffs May Litigate the Denial of Class Certification Even After the Loss of An Individual Stake in the Merits.

This case is not moot because named plaintiffs may litigate the denial of class certification even after the loss of an individual stake in the merits. In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Id.* at 404. This is because "a case or controversy still exists" for the members of the proposed class — the class the named plaintiff sought to represent. *Id.* at 407; *see also id.* at 396.

This case presents a live controversy under *Geraghty* because petitioner Laurence St. Pierre continues to contest the district court's failure to certify the class.[1] The government errs in its assertion that petitioners "neither contest the district court's failure to certify the class as a class action nor identify any putative class member, other than the named petitioners who have been removed to Haiti, who seeks to maintain this action." Opp. Cert. at 9. Petitioners have consistently contested the district court's dismissal of their motion for class certification as "moot" after the court dismissed the case on the merits.[2] It is

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[1] The government correctly points out that five of the original six petitioners were dismissed from this action. Opp. Cert. at 6, 8. Laurence St. Pierre, however, has not been dismissed.

[2] The district court failed to rule separately on the motion for class certification and dismissed the motion for class certification as moot after first denying the underlying claims on their merits without even holding an evidentiary hearing. App. at 40. In this way, the district court inextricably intertwined the merits of the case with the class certification issue.

simply untrue that petitioners have not identified any other putative class members who seek to maintain this action. Before the court of appeals, four other similarly situated Haitians moved to intervene in this case.[3] These motions were denied without reasoning by the court of appeals in a separate order on the same day that it denied the appeal in this case. App. 1.

### B. The Controversy Over the Becraft Haitian Detention Policy Is Still "Live" for Members of the Proposed Class and Any Factual Dispute As to Its Viability Must Be Resolved in the First Instance by the District Court.

The controversy over the Haitian detention policy instituted by INS Acting Deputy Commissioner Peter Michael Becraft is still "live" for members of the proposed class. *Geraghty*, 445 U.S. at 396. Contrary to the government's suggestion, the November 13, 2002 Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,926 (2002) ("November 2002 Notice"), does not "supersede" the challenged Becraft Haitian detention policy. Opp. Cert. at 9. The Becraft policy mandates the incarceration of virtually all Haitian asylum-seekers pending an adjudication of their asylum claims, including Haitians like the proposed class members who were interdicted at sea and subjected to expedited removal proceedings. The November 2002 Notice does nothing more than expand the class of aliens subject to expedited removal proceedings to include sea arrivals who make it to land without interdiction. 67 Fed. Reg. at 68,925. Moreover, contrary to the government's claim, the November

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[3] Guerda Alexis, Marie Guerrier, Darius Satune, and Ysmanie Toussaint filed motions to intervene in this case before the court of appeals.

2002 Notice does not mandate that all non-Cubans will be detained without the possibility of parole. As recognized by the government in the Supplementary Information explaining the new rule, "[p]arole of such aliens based on humanitarian concerns may be considered in accordance with section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5) and 8 CFR 212.5." 67 Fed. Reg. at 68,925. *This is simply a restatement of the very parole authority at issue in this case.* In any event, the question of whether the November 2002 Notice supersedes the Becraft detention policy is a factual issue that must be determined by the district court in the first instance.[4]

### C. The Issues in This Case Are of the Type "Capable of Repetition Yet Evading Review."

Petitioners' claims are "capable of repetition yet evading review" and are therefore not moot. *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982). There is a reasonable expectation that petitioners could return to the United States seeking protection from persecution in Haiti and there is a reasonable expectation that they will be detained again pursuant to the same policy they now challenge.[5] The challenged policy has not been withdrawn, and, given conditions in Haiti, it is more likely that petitioners will flee future persecution. And, like the gestation

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[4] To the extent the government argues that it is no longer using national origin and/or race as a broad factor in discriminating against Haitian asylum-seekers regarding their release from detention pending the adjudication of their asylum claims, this case must be remanded to the district court for initial factual determinations.

[5] Petitioners, after being removed from the United States, could return to the United States seeking the protection of our asylum laws. The immigration regulations recognize that previously removed individuals could return seeking protection from persecution. 8 C.F.R. § 241.8(e) (exempting from reinstatement of removal returning individuals who have a "fear of returning" to their home country).

period in *Roe v. Wade*, 410 U.S. 113, 123-25 (1973), and the pretrial detention period in *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), the time period during which a detainee is unlawfully denied parole under the Becraft policy is short relative to the time required for judicial review. The detention lasts only as long as it takes for the administrative agency to process the detainees' underlying asylum cases.

## II. IF THIS CASE IS MOOT, THE PROPER REMEDY IS VACATUR OF THE LOWER COURT'S DECISION.

If this Court finds that this case is moot, this Court should follow its established practice of remanding this case to the court of appeals with instructions to vacate the judgment of the district court below. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). The government incorrectly argues that this established practice is inapt because "the case became moot due to petitioners' own decisions." Opp. Cert. at 9 n.2.

### A. Petitioner St. Pierre Took No Voluntary Action To Moot Her Appeal.

Petitioner St. Pierre took no voluntary action to moot her claims in this case. Her administrative appeal of her asylum case was dismissed on December 17, 2002, thus subjecting her to a final order of removal. That she "declin[ed] to seek judicial review of her final administrative removal order," as the government points out, Opp. Cert. 9 n.2, is irrelevant to whether or not she voluntarily gave up her legal claims *regarding detention* while her asylum claim was pending. An order of removal becomes final after dismissal of an appeal by the Board of Immigration Appeals.[6] As someone subject to a final order of removal,

[6] The filing of a petition for review with the court of appeals for review does not stay removal. 8 U.S.C. § 1252(b)(3)(B).

she was no longer eligible for parole under 8 U.S.C. § 1182(d)(5), the parole statute at issue in this case.[7] Therefore, once her asylum appeal was dismissed, she was precluded from litigating an appeal in this case through no fault of her own. Her case is a classic example of the circumstances in which the vacatur principle of *Munsingwear* is intended to apply.

The government incorrectly conflates petitioner St. Pierre's two appeals — the appeal in this case addressing the legality of her detention and the administrative appeal in her asylum case — when it argues that her decision not to seek review of her asylum case renders vacatur inappropriate. Opp. Cert. at 9 n.2. The two cases cited by the government do not support the government's argument because they involve litigants who either settled their direct legal claim or failed to file an appeal.[8] In contrast, petitioner St. Pierre did appeal the decision she now seeks to vacate and she has not entered into a settlement agreement. In any event, as discussed above, the filing for judicial review of her asylum case would not have extended her eligibility for release on parole. *See supra* note 7. Thus, this case falls squarely under *Munsingwear*, and

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[7] The parole statute at issue in this case, 8 U.S.C. § 1182(d)(5), does not apply to aliens with final orders of removal. Under the regulations, an order of removal becomes final "[u]pon dismissal of an appeal by the Board of Immigration Appeals." 8 C.F.R. § 241.1(a). Filing for judicial review of a final order of removal does not continue an individual's eligibility for parole under 8 U.S.C. § 1182(d)(5).

[8] In *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship.*, 513 U.S. 18 (1994), this Court held that vacatur is not appropriate when the petitioner enters into a settlement agreement. *Id.* at 25. Here, petitioner St. Pierre did not settle or otherwise voluntarily give up her challenge to the legality of her detention while her asylum case was pending. *Karcher v. May*, 484 U.S. 72 (1987), is equally inapposite. *Karcher* was a case filed by legislative officers. After the legislative officers were no longer in office, their successors decided not to appeal the case. *Id.* at 76. This Court held that vacatur was not appropriate because the successor litigants had declined to pursue the appeal.

this Court should follow its established practice of vacating the judgment below.

### B. Equitable Factors Weigh in Favor of Vacatur.

Vacatur is an "equitable remedy" that is particularly appropriate in this case. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 25; *see also id.* at 24, 26 (it is the Court's practice to "dispose[ ] of moot cases in the manner most consonant to justice" and to take account of the "public interest") (internal quotation marks omitted); *id.* at 29 (noting that mootness may be appropriate even when it is produced by settlement because "exceptional circumstances may conceivably counsel in favor of such a course"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) ("[W]e have authority to make such disposition of the whole case as justice may require.") (internal quotation marks omitted). In this case, multiple factors weigh in favor of vacatur.

First, even if this Court finds it relevant that some of the petitioners withdrew their asylum administrative appeals and that petitioner St. Pierre declined to seek judicial review of her final order of removal, this Court should vacate the decisions below based on the circumstances underlying petitioners' decisions. After their arrival by boat on December 3, 2001, petitioners Hedwiche Jeanty, Junior Prospere, and Brunt Colas were detained in overcrowded facilities for almost a year. App. at 57-59. Petitioner Laurence St. Pierre also suffered extensively during her detention of more than a year. App. at 61, 71-72. These conditions had a serious negative impact on petitioners' mental health. App. at 89-91. The choice to remain in immigration detention, given the unlikely possibility that their appeals would be granted by the Board of Immigration Appeals — solely in order to preserve the right to challenge that detention — was hardly a choice at all. The prolonged detention of these asylum

seekers constitutes a compelling, "exceptional circumstance[ ]," *U.S. Bancorp Mortgage Co.*, 513 U.S. at 29, counseling in favor of vacatur.

Second, vacatur is appropriate as an equitable matter because petitioners are seeking to represent members of a proposed class that will be affected by the lower court decision. *See Arizonans for Official English*, 520 U.S. at 72 n.27 (suggesting that whether or not petitioner sued on behalf of a class may have an effect on the appropriateness of vacatur). In this case, petitioners seek to represent a class of persons who would now be affected by the lower court decision if it is not vacated. This is a unique fact that should lead this Court to conclude that "vacatur . . . is the equitable solution." *Arizonans for Official English,* 520 U.S. at 75.

## III. THE COURT OF APPEALS' OPINION CONFLICTS DIRECTLY WITH *JEAN V. NELSON.*

### A. The Government Fundamentally Mischaracterizes This Court's Holding in *Jean v. Nelson.*

The government incorrectly portrays this Court's holding in *Jean v. Nelson*, 472 U.S. 846 (1985), as nothing more than an "agreement" between the parties. *Id. Jean* involved a constitutional equal protection challenge to a parole policy that discriminated against Haitians. During the course of the litigation, the government conceded that that parole regulation *and statute* prohibited discrimination based on race and/or national origin. *Id.* at 855. The Court decided the case on statutory and regulatory grounds, considering a number of factors.[9] Based on these

[9] Specifically, the Court considered that 1) the parole statute and regulation provided a list of neutral criteria for the granting of parole; 2) nationality-based criteria had been adopted in other INS regulations; and 3) the government had conceded that the statute and regulation required race- and nationality-neutral adjudications. *Id.* at 855-56.

factors, the Court interpreted the parole statute and regulation as requiring "individualized determinations of parole" that are made "without regard to race or national origin." *Id.* at 857.

That the Court was engaged in statutory interpretation is apparent throughout the opinion. The Court repeatedly referred to the fact that it was engaged in statutory interpretation. For example, it referred to "statutory construction" as a means of avoiding constitutional questions. *Id.* at 854. Elsewhere, the Court noted that "[b]ecause *the current statutes and regulations* provide petitioners with nondiscriminatory parole consideration . . . there was no need to address the constitutional issue," and observed that there are limits upon immigration officials' "broad statutory discretion." *Id.* at 854-55, 857 (emphasis added). Finally, the Court stated that immigration "officials, while like all others bound by the provisions of the Constitution, *are just as surely bound by the provisions of the statute and of the regulations. Id.* at 857 (emphasis added). The government thus distorts *Jean* by ignoring the statutory holding of the case to protect the petitioners from future discriminatory treatment.

The government's attempt to distinguish *Jean* on its facts also fails. The government characterizes the holding in *Jean* as applying only to "low-level INS personnel [who] allegedly were making parole determinations in contravention of official INS policy." Opp. Cert. at 12. The government further points out that the author of the Becraft Haitian detention policy, Peter Michael Becraft, is Acting Deputy INS Commissioner, someone who has been delegated the Attorney General's parole authority under the regulations. Opp. Cert. at 11-12. Neither of the government's observations, however, successfully rebuts petitioners' arguments. Whatever the underlying facts of *Jean*, the end result was that this Court interpreted the parole statute and regulation as precluding discrimination. This interpretation still governs today. Even if the Acting

Deputy INS Commissioner has the authority to exercise the Attorney General's parole authority, this authority must be exercised within the bounds of the parole statute. As is discussed below, the Attorney General himself does not have the authority to contravene a statute.

### B. Given the Statutory Prohibition Against Parole Discrimination, the Attorney General or His Subordinates Were Not Free to Adopt the Becraft Haitian Detention Policy.

Neither the Attorney General nor his subordinates were free to adopt the Becraft Haitian detention policy because the parole statute requires nondiscriminatory parole adjudication. That the Attorney General is bound by the dictates of Congress is uncontroverted. *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001) (characterizing the issue as the "extent of the Attorney General's authority under the post-removal-period detention statute"); *see also U.S. v. Witkovich*, 353 U.S. 194, 199 (1957) (construing the congressional grant of authority to the Attorney General as including a limitation). The government's statement that "it is well-accepted in the immigration area that policy adjustments may be implemented 'to make a humane response to a natural catastrophe or an international political situation'" therefore misses the point. Opp. Cert. at 11 (citing *Mathews v. Diaz,* 426 U.S. 67, 81 (1976), and *Sale v. Haitian Centers Counsel, Inc.,* 509 U.S. 155 (1993)). The issue is not whether the government can make immigration policy adjustments. Rather, the issue is whether a subordinate of the Attorney General can authorize a discriminatory policy despite the fact that a statute forbids it. Thus, the government's cases in support of the exercise of discretion in the area of immigration detention are irrelevant. Opp. Cert. at 11 (citing *Demore v. Kim*, 123 S. Ct. 1708, 1718-1719 (2003) (discussing *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993)); *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001)).

## CONCLUSION

For the reasons stated above and in petitioners' petition for a writ of certiorari, this Court should grant certiorari in this case or, in the alternative, vacate the decisions of the court of appeals and district court as moot.

Respectfully submitted,

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